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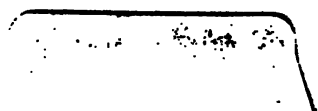
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ANNEX

U.

THE LAW
OF MAGISTRATES AND CONSTABLES,
IN THE STATE OF SOUTH-CAROLINA.

COMPRISING
A DIGEST OF THE DUTIES AND POWERS OF THESE OFFICERS, AS ESTABLISHED BY THE
STATUTE LAW, AND ADJUDGED CASES IN THE COURTS OF THIS STATE.

WITH
A N ADDITION OF THE COMMON LAW OF CRIME.

TO WHICH IS ADDED,
A NUMBER OF WARRANTS AND OTHER PRECEDENTS,
UNDER THEIR SEVERAL HEADS.

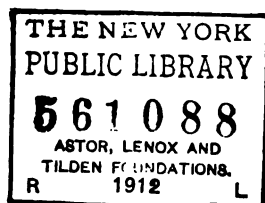
PREPARED
By B. C. PRESSLEY, Esq.,
OF THE CHARLESTON BAR.

BY THE APPOINTMENT OF THE GOVERNOR OF THE STATE, HIS EXCELLENCY DAVID JOHNSON.

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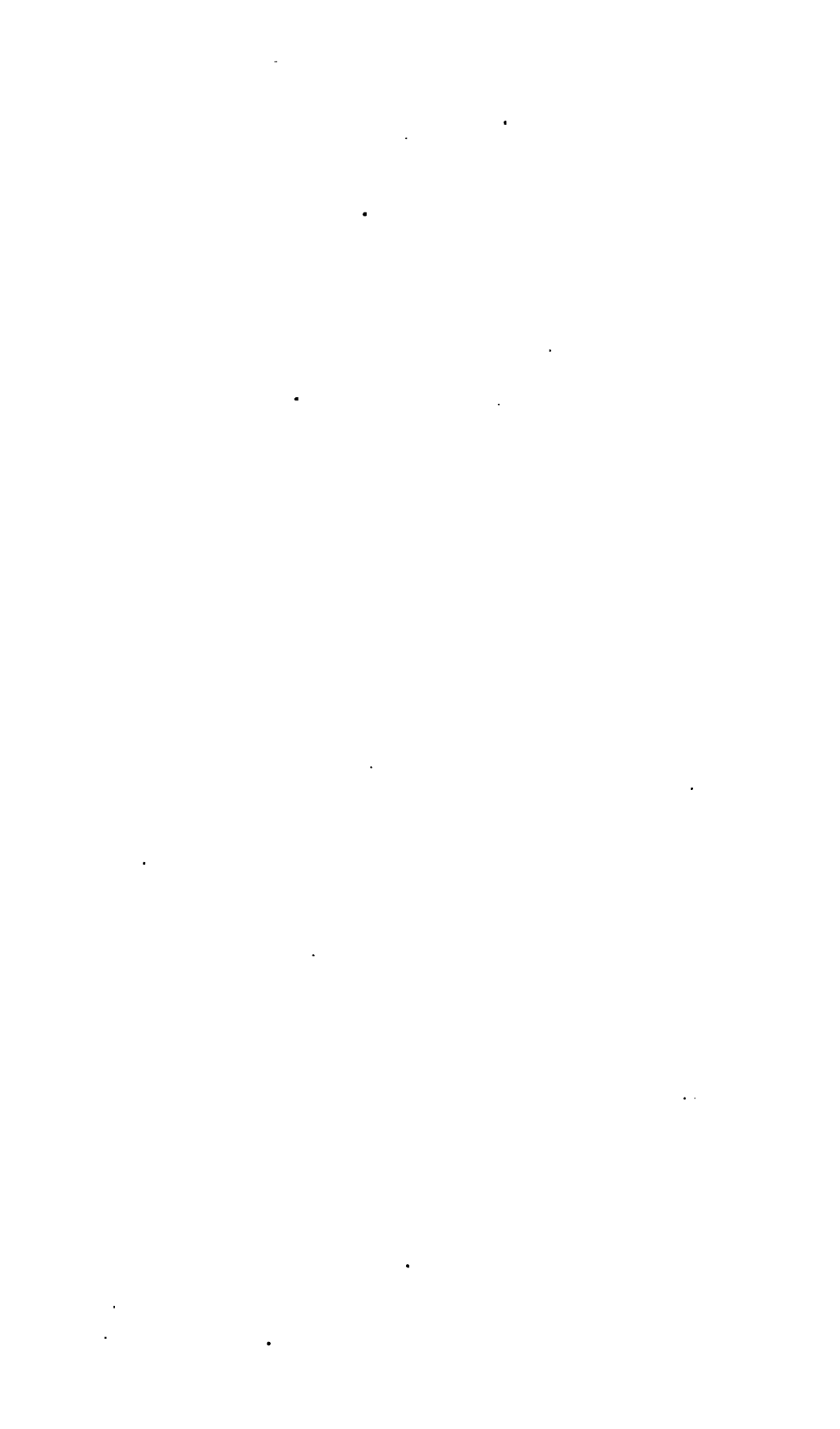
1848.

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NOTE.

According to the rule in James' Digest, the penalties under the several Acts may be reduced to dollars and cents, at the following rate, viz:—One pound currency at 60 cents; one pound proclamation money, at 85 cents; and one pound sterling at \$4, 28. 6.



IN THE HOUSE OF REPRESENTATIVES, DEC. 17, 1846.

The Committee on District Offices and Officers, to whom was referred a Resolution to authorize the Governor to cause a compilation of the laws and decisions of the Court of Appeals, relative to the duties and powers of Magistrates and Constables, have had the same under consideration, and beg leave to Report: That they cannot, in their opinion, too strongly impress upon the House, the necessity of such a work, as the said resolution contemplates. That the Magistrates and Constables of the State are, in a large majority of cases, ignorant of the laws which the Legislature makes it their duty to enforce, does not admit of a doubt. These laws are now dispersed over many thousands of pages of law books, which are to them, in a great measure, wholly inaccessible, and being thus deficient in the knowledge of the laws which it is their duty to enforce, and having no means within their power to obtain that knowledge, they must, of necessity, be wanting in that confidence in their own ability, without which it is in vain to expect an efficient discharge of their duties. This being so, instead of administering the law as it is, their own judgement and impulses, are, of necessity, substituted for the law, and wrongs are thus being continually inflicted upon the rights of the people, which has rendered the office itself, not only odious, but a positive tyranny, which calls loudly upon this Legislature for a remedy.

Numerous prosecutions are continually occurring, upon frivolous and insufficient grounds, crowding the sessions dockets, all over the State—absorbing the time of the Courts—fomenting discords and strife among the people—taxing the time and means of defendants and prosecutors to a grievous extent, and drawing annually, large sums of money from the public Treasury to pay the costs of prosecutions. .

Your Committee, from a full examination of the subject, are persuaded that the evil referred to is of much greater magnitude than

seems to be generally supposed, and they cannot but deem it the imperious duty of the Legislature, to provide a remedy for these evils, and to guard the State from the reproach of permitting a continuation of this extensive and continually increasing mal-administration of justice by these inferior tribunals, whose acts affect most unjustly the rights of large masses of the people. In the judgement of your Committee, it is due to the character of the State, that something should be done to abate these evils, and to provide for a more just and a more enlightened administration of the law. Your Committee submits that the remedy is to be found in a complete revision and re-publication of the law in relation to these offices, and by placing it in a condensed form in the hands of every Magistrate and Constable appointed by your authority, as contemplated by the resolution referred to. The law thus simplified and condensed, with all necessary forms under each appropriate head, would bring it at once within the grasp and comprehension of the most common understanding, and with such a manual in their hands, it would be hardly possible for them to err.

Such a work, your Committee deem entirely practicable and expedient, and which, when completed, would render the duties of the offices of Magistrate and Constable, plain and intelligible. It would, in the opinion of your Committee, in a very short time, effect a most salutary change in the administration of the duties of these offices, and they feel confident would also soon redeem the office of Magistrate from the degradation to which it is now reduced, and they are equally confident would, in addition to the above enumerated advantages, relieve the Treasury from the burthen of a very heavy annual charge. Such a work, in the opinion of your Committee, would be also of much value, not only to the citizens of the State, generally, but likewise to the professional lawyer.

Resolved, That His Excellency, the Governor, be authorized and requested to employ some fit and competent person to compile, under his direction, all the laws now of force, in this State, in regard to the powers and duties of Magistrates and Constables, with a digest of the decisions of the Court of Appeals in relation thereto. And that he be further requested to communicate, at the next session of the Legis-

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!ature, the progress of this work, and the compensation he may deem just and equitable should be paid to the person thus employed.

Resolved, That the House do agree to the Report.

Ordered, That it be sent to the Senate for concurrence.

By order,

T. W. GLOVER, C. H. R.

IN THE SENATE, December 18, 1846.

Resolved, That the Senate do concur in the Report.

Ordered, That it be returned to the House of Representatives.

By order,

WM. E. MARTIN, C. S.

INTRODUCTION.

THERE seems to be some diversity of opinion as to when Justices of Peace were first appointed. Polidore Virgil says that they had their beginning in the reign of William the Conqueror: Sir Edward Coke was of opinion that it was not until the sixth year of Edward 1st: Mr. Prynne affirms, that in the reign of Henry 3d, after the agreement between that king and his barons, *Guardians ad Pacem Conservandam* were constituted: and Sir Henry Spelman differs from all, being of opinion, that there were no Justices until the beginning of the reign of Edward 3d. *Tom.* 322. To this latter opinion, Lambard, Dalton, Nelson, Bacon and Burns, incline. Yet before the time of Edward 3d, and long before the conquest, at common law there were certain Conservators of the Peace, which were of two sorts; first, those who, in respect of their offices, had power to keep the peace, but were not called by the name of Conservators of the Peace, but by the name of such offices; second, those who were constituted for this purpose only, and were called Conservators or Wardens of the Peace. Of the first sort were, the Lord Chancellor, etc., the Justices of the King's Bench, the Master of the Rolls, Justices of Gaol-Delivery, the Sheriff, Coroner, also every high and petty Constable, and to these latter offices the duty of keeping the peace is still incident. *Lam. book 1st, c. 3.* The second class, or Conservators of the Peace, simply so called, were either ordinary or extraordinary. The ordinary were either by tenure, to wit, such as held their lands by this service; or by prescription, viz., such as claimed such power by immemorial usage in themselves and their ancestors, or those whose estate they had; or, by election, viz., such as were chosen by the freeholders of a county in pursuance of the king's writ for this purpose; but the power of those Conservators of the Peace seems to have been no greater than that of the Constables of this day. *Lam. book 1, cap. 3.* The extraordinary, as he was endowed with high power, so he was appointed in times of great trouble only; and he had charge to defend

the coast and country from foreign and inward enemies, and might command the sheriff and all the shire to assist him; as appears by a patent remaining of record in the tower, made in An. 49, 11. 3d, in the name of that king, by Simon, Earl of Leicester, whose prisoner he then was. *Lam. book 1, c. 3.*

Such were the Conservators of the Peace, until the time of Edward 3d, in whose reign Justices of the Peace were first appointed, and their power greatly enlarged. Of the occasion in which the first change was made, Lambard gives the following account, viz. : "After such time as Queen Isabel, contending with her husband, King Edward the second, was returned over the seas into England, accompanied with her son prince Edward, afterwards Edward 3d, and with Sir Roger Mortimer, and such others of the English nobilitie, as had for the indignation of the King fled over the seas unto her: she soon after got into her hands the person of the old king, partly by the assistance of the Henalders that she brought with her, and partly by the aid of such other of her friends as she found ready here, and she immediately compelled him by force to surrender his crown to the young prince. And then forasmuch as it was, not without cause, feared that some attempt would be made to rescue the imprisoned king; order was taken that he should be conveyed securely and by night watches from house to house and from castle to castle, to the end that his favourers should be ignorant what was become of him. Yea and then withal it was ordained by Parliament in the life-time of the deposed king and in the very first entry of his son's reign, (1 *E.* 13, c. 15,) that in every shire of the realm, good men and lawful, which were no maintainers of evil nor barretors in the country, should be assigned to keep the peace; which was as much as to say, that in every shire, the king himself should place special eyes and watches over the common people, that should be both willing and wise to foresee, and be enabled with meet authority to repress all intentions of uproar and force, even in the first seed thereof; so that for this cause, the election of the simple Conservators of the Peace was first taken from the people and transferred to the assignment of the king." *Lam. book 1, c. 4.*

Whether a forced construction was put upon the above recited statute, or whether the commissions, issued by the king, according to its authority, extended the authority of the Wardens of the Peace, doth not appear, but Lambard records that soon after, viz: In the third year of *Edward 3.*, an indictment for murder was found before one Warden of the Peace. And the Statute 4, *Edward 3.*, c. 2, recog-

nizes the authority of the said Wardens to indict, and takes order that persons indicted before them should not be bailed by the Sheriff or other Ministers, unless bailable by law. *Ibid.* Nor was their authority in this respect, long left in doubt, but rather greatly extended, by the Statutes, 18 *Edw.* 3, c. 2, and 34 *Edw.* 3, c. 1. By the former of which, it is enacted, that two or three of the best reputation in the counties should be assigned keepers of the peace by the king's commission, and at what time need shall be, the same with other wise and learned in the law, shall be assigned by the king's commission to hear and *determine* felonies and trespasses done in the said counties, and to inflict punishment reasonably, according to the law and reason and the manner of the deed.

By the latter Statute, it is enacted, that in every county in England, shall be assigned for the keeping of the peace, one lord, and with him three or four of the most worthy in the county, with some learned in the law, and they shall have power *to restrain offenders, rioters, and all other barretors, and to pursue, arrest, take and chastise them,* according to their trespass or offence, and *to cause them to be imprisoned and duly punished according to the law and customs of the realm, and according to that which to them shall seem best to do by their discretion and good advisement, and also to inform them and to inquire of all those that have been pillars and robbers beyond the sea;* and be now come again and go wandering, and will not labor as they were wont in times past, and to take and arrest all those that they may find by indictment or by suspicion, and put them in prison, and to take of all them that be not of good fame where they shall be found, sufficient surety and mainprize of their good behavior towards the king and his people, and the other duly to punish, to the intent that the people be not by such rioters or rebels troubled or endamaged, nor the peace blemished, nor merchants nor others passing by the highway of the realms, disturbed or put in the peril, which may happen of such offenders, and *also to hear at the king's suit all manner of felonies and trespasses done in the same county, according to the laws and custom aforesaid.*

The king's commissions, issued by authority of the above recited Statutes, created two orders of Justices. The first having authority to keep the peace, and to enforce and punish offences against the Statutes, made for the quiet and good government of the realm; also, to act with the others in trying and punishing the higher offences mentioned in the Statutes, and were called simply Justices of the Peace. 2 *Haw. P. C.*, 50.

INTRODUCTION.

The second was of those described in the said Statutes, "as persons learned in the law," and had the same authority and duties as the first, with the additional proviso, that the presence of one of this number was always necessary to the trial and punishment of all offences other than mere breaches of the peace. They were called Justices of the Quorum, from that word being first in the clause, of the commission, which assigned to them special duties. *Ibid, and Lam. 48.*

By the same commission, the Justices Court of Sessions was first instituted, for it commanded the said justices to make inquiries touching the said premises, and to hear and determine the same *at certain days and places* as might be appointed by them, or any two or more of them, to which days and places the Sheriff was commanded to return before them so many lawful men of his bailiwick, by whom the truth of the premises might be made known and inquired. 2 *Haw. 51.* Afterwards, by Statute 2 *Hen. 5, c. 4,* they were required to hold their sessions four times in the year, at certain periods fixed by said Statutes, and hence their sittings were called quarter sessions. *Lam. book 4; c. 19.*

The form of the commission was frequently changed in the reign of Edward 3, and of almost every succeeding Prince, till the 30th *Eliz.*, when by the number of Statutes, particularly given in charge therein to the justices, many of which had been repealed, and much error and corruption having crept into it, partly by the error of clerks, and partly by the untoward huddling of things together, it was become so blemished and defective, that it required much to be adjusted.

These imperfections being known to Sir Christopher Wrey, then Lord Chief Justice of the King's Bench, he had a conference with the other judges and barons, and the commission was carefully refined in Michaelmas term, 1590, and being there presented to the Lord Chancellor, it obtained his approbation, and he commanded it to be used, and is as follows: *Lam. c. 9.*

To A. B. C. D., &c., greeting.

"Know ye that we have assigned you, jointly and severally, and every one of you our justices, to keep our peace in our county of S. And to keep and cause to be kept all ordinances and statutes for the good of the peace, and for preservation of the same, and for the quiet rule and government of our people made, in all and singular their articles in our said county (as well within liberties as without) according to the force, form, and effect of the same; and to chastise and punish all persons that offend against the form of those ordinances or statutes, or any one of them, in the aforesaid county, as it ought to be done according to the form of those ordinances and statutes; and to cause

to come before you, or any of you, all those who to any one or more of our people concerning their bodies or the firing of their houses, have used threats, to find sufficient security for the peace, or their good behaviour, towards us and our people; and if they shall refuse to find such security, then them in our prisons, until they shall find such security, to cause to be safely kept.

“We have also assigned you, and every two or more of you (of whom any one of you the aforesaid *A. B. C. D.*, &c., we will shall be one) our justices to inquire the truth more fully, by the oath of good and lawful men of the aforesaid county, by whom the truth of the matter shall be the better known, of all and all manner of felonies, poisonings, enchantments, sorceries, arts, magic, trespasses, forestallings, regratings, ingrossings, and extortions whatsoever; and of all and singular other crimes and offences, of which the justices of our peace may or ought lawfully to inquire, by whomsoever and after what manner soever, in the said county done or perpetrated, or which shall happen to be there done or attempted; and also of all those who in the aforesaid county in companies against our peace, in disturbance of our people, with armed force have gone or rode, or hereafter shall presume to go or ride; and also of all those who have there lain in wait, or hereafter shall presume to lie in wait, to maim or cut or kill our people; and also of all victuallers, and all and singular other persons, who in the abuse of weights or measures, or in selling victuals, against the form of the ordinances and statutes, or any one of them therefore made, for the common benefit of *England*, and our people thereof, have offended or attempted, or hereafter shall presume in the said county to offend or attempt; and also of all sheriffs, bailiffs, stewards, constables, keepers of gaols, or other officers; who in the execution of their offices about the premises, or any of them, have unduly behaved themselves, or hereafter shall presume to behave themselves unduly, or have been, or shall happen hereafter to be careless, remiss, or negligent in our aforesaid county; and of all and singular articles and circumstances, and all other things whatsoever, that concern the premises, or any of them, by whomsoever, and after what manner soever, in our aforesaid county done or perpetrated, or which hereafter shall there happen to be done or attempted in what manner soever; and to inspect all indictments whatsoever so before you or any of you taken or to be taken, or before others late our justices of the peace in the aforesaid county made or taken, and not yet determined; and to make and continue processes thereupon, against all and singular the persons so indicted, or who before you hereafter shall happen to be indicted; until they can be taken, surrender themselves, or be outlawed: *and to hear and determine all and singular the felonies, poisonings, enchantments, sorceries, arts, magic, trespasses, forestallings, regratings, ingrossings, extortions, unlawful assemblies, indictments aforesaid, and all and singular other the premises, according to the laws and statutes of England*, as in the like case it has been accustomed, or ought to be done; and the same offenders, and every of them for their offences, by fines, ransoms, amerciaments, forfeitures, and other means as according to the law and custom of *England*,

or form of the ordinances and statutes aforesaid, it has been accustomed, or ought to be done, to chastise and punish.

"Provided always, that if a case of difficulty, upon the determination of any the premises, before you, or any two or more of you, shall happen to arise; then let judgment in no wise be given thereon, before you, or any two or more of you, unless in the presence of one of our justices of the one or other bench, or of one of our justices appointed to hold the assizes in the aforesaid county.

"And therefore we command you, and every of you, that to keeping the peace, ordinances, statutes, and all and singular other the premises, you diligently apply yourselves; and that at certain days and places, which you or any such two or more of you as is aforesaid shall appoint for these purposes, into the premises ye make inquiries; and all and singular the premises hear and determine, and perform and fulfil them in the aforesaid form, doing therein what to justice appertains, according to the law and custom of *England*; saving to us the amerciements and other things to us therefrom belonging.

"And we command, by the tenor of these presents, our sheriff of *W.*, that at certain days and places, which you or any such two or more of you as is aforesaid, shall make known to him, he cause to come before you, or such two or more of you as aforesaid, so many and such good and lawful men of his bailiwick (as well within liberties as without) by whom the truth of the matter in the premises shall be better known and inquired into.

"Lastly, we have assigned you the aforesaid *A. B.*, keeper of the rolls of our peace in our said county. And therefore you shall cause to be brought before you and your said fellows, at the days and places aforesaid, the writs, precepts, processes, and indictments aforesaid, that they may be inspected, and by a due course determined as is aforesaid.

"In witness whereof we have caused these our letters to be made patent. Witness ourself at *Westminster*, &c."

In addition to the powers of justices set forth in this commission, other authority was conferred by numerous statutes. Thus, by 4 *H. 7*, c. 12, they were required to enforce the laws against *counterfeits, murders, robberies, unlawful retainers, idleness, unlawful plays, extortions, misdemeaning of Sheriffs, escheators, and many other enormities*; and by the Statutes 5 *Eliz.*, c. 1; 23 *Eliz.*, c. 1; 1 and 2 *P. & M.*, c. 13, they were required to take indictments of certain offences declared treason by the first two mentioned Statutes, and to certify the same into the King's Bench or gaol delivery, and by the last two Statutes, a single justice was authorized to arrest and commit or bail persons charged with manslaughter and felony. 3 *Bac.*, 291; 2 *P. L.*, 482.

Thus we find that both by force of the above recited commission, and the said Statute of 4 *H. 7*, c. 12, the justices in their sessions

were empowered to try murders and manslaughter as well as other felonies ; yet Bacon affirms, 3 *Bac. p.* 292, that they seldom exercised jurisdiction herein or in any offences from which clergy was taken away, and he gives two reasons for the same.

1st. By reason of the monition in their commission, that in cases of difficulty they should not give judgment, but in the presence of one of the justices of one or other bench. *Ann.*

2nd. By reason of the Statute 1 and 2, *P. and M., c.* 13, which directs the justices of the peace in cases of manslaughter and other felonies, to bind over the prosecutor and party to the next general gaol delivery. Lambard also in his 4th book, though he gives directions for forming and charging the Grand Jury, and also for the other proceedings in the trial of felons ; yet adds, that in the trial of felons the justices of the sessions are not now-a-days much occupied ; the rather, because they defer it till the coming of the justices of assize, by reason of the Statute 1 and 2 *P. and M. c.* 13.

Such were the *general* powers of justices of the peace and quorum up to the time of our provincial legislation, besides which the execution of numerous statutes was committed to their charge, sometimes to one justice, sometimes to two, sometimes to their sessions, sometimes out of their sessions ; but as many of said statutes are not now of force, and others will necessarily receive special notice under their appropriate heads, further notice here would become both tedious and unprofitable, and we therefore proceed at once to notice a few important particulars, in which these general powers have been enlarged or diminished by the legislation of South-Carolina.

First. By an Act passed in 3d James 2., A. D. 1686, 2 *P. L.* 27, and re-enacted from time to time until made perpetual by Act of Dec. 12, 1712, 2 *P. L.* 598, the trial of actions for debt or other demand to the extent of forty shillings, which before belonged to the sheriffs' court or court of pleas, was committed to justices of the peace. And by Act of 1799 and 1805, their jurisdiction in such causes was extended, first, to the amount of twenty, and afterwards to thirty dollars ; but the Constitutional Court, in the case of *White vs Kendrick*, 1 *Bre. Dig.*, 476, having decided the latter act to be unconstitutional, the amount to which their jurisdiction should extend was settled, 6 *P. L.* 239, at twenty dollars.

Secondly. The Act of 1731, 3 *P. L.* 282, transfers all the powers of justices of the peace in their sessions to a court of general sessions of the peace, to be held by the chief justice and two assistant judges ; and since the power of said justices of the peace, to try and punish

criminals, was chiefly to be exercised in their quarter sessions, it follows, that from the time of this Act their authority to try and punish was confined to a few special offences committed to them by Statute; and in 1734, 7 *P. L.* 187, they were excused wholly from attending the sessions, except they had recognizances to return.

Third. By Act of 1740, and its various amendments, the trial and punishment of slaves and free persons of colour for all manner of offences whatsoever, was committed to justices of the peace, in some instances to one, and in others to two justices; but now by Act 1839, one may try a slave or free person of color for any offence whatsoever; and by the same Act of 1839, all distinction between justices of the peace and quorum is abolished, and all are called by the title of Magistrate.

Besides these changes in the general powers, might be noticed many special duties from time to time added to their office, such as the execution of the Habeas Corpus, the trial of vagrants, proceedings in forcible entry, &c.; but these matters may be specially seen under their appropriate heads.

LAW OF MAGISTRATES.

ABDUCTION.

The taking away or causing to be taken away a maiden under the age of sixteen years, from the custody and against the will of her father, mother, or other persons having charge of her. 4th and 5th P. & M., c. 8. ^{What constitutes.}

The person charged with the offence must be above the age of fourteen years. ^{Who can be charged.}

The punishment is fine and imprisonment; and if, in addition to taking away, the maiden be deflowered or married, the imprisonment is extended to five years. ^{Punishment.}

ABOLITION.

Any white person who shall directly or indirectly circulate, or bring within the State any written or printed paper, with intent to disturb the peace or security of the State in relation to the slaves thereof, upon conviction, shall be fined not exceeding one thousand dollars, and imprisoned not exceeding one year. Act A., 1820, L. S., 7,460. ^{White person circulating papers.}

A free person of colour, for the first offence, shall suffer the like fine and imprisonment; for the second, shall be whipped not exceeding fifty lashes, and be banished from the State; and for returning from banishment, unless by unavoidable accident, shall suffer death without clergy. Act A., 1844, L. S., 292. ^{A person of color.}

ACCESSARIES.

An accessory is he who is not the chief actor in the offence, nor present at its performance, but is in some way concerned therein either before or after the fact committed. B. C., 4th p., 35. ^{Definition.}

1st. Of what offences.

None in
treason.

All persons concerned in treason are principals; so also in assault and battery, and all other offences less than felony.

2d. Before the fact.

An accessory before the fact, is he, who being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit it.

None in
sudden
offences.

Offences, which, in the construction of law, are sudden and unpremeditated, cannot have any accessories before, but may after.

Wife may be

Master may
be to slave.

A wife may be an accessory before the fact, by procuring her husband to commit a felony; 2 Haw., 320. A master or other white person may be accessory to a slave, and the confessions of the slave admitting his guilt as principal, are evidence against a white person on trial as accessory. So also the records of conviction of the slave. 2 Bail., 29.

3d. After the fact.

Must be
complete.

Wife cannot
be, but
parent can.

An accessory after the fact, is one who, knowing a felony to have been committed, yet shelters, conceals, or assists in the escape of the felon. The felony must be complete at the time of the assistance given, else it makes not the assistant an accessory. The wife cannot become an accessory by concealing her husband, for she is presumed to act under his coercion; but the husband becomes accessory by concealing the wife, the parent by concealing the child, &c. B. C., 4, 39.

Necessary proceedings.

The affidavit should set forth particularly the full name of the principals, if known, the offence committed, with time, place, and circumstance; the name of the accessory, and what part he acted in the matter, and should be attached to the warrant. An accessory may be admitted to bail in no case where the punishment of the offence is death without benefit of clergy, but may be bailed in all other cases. Act 1839, 1. He may be arrested and committed, or bailed (but not tried) before the principal.

ACCOMPLICE.

1st. DEFINITION.

An accomplice is one of two or more, equally concerned in a felony, and the term is generally applied to those who are admitted to give evidence against their fellow criminals. Tom. Dic.

2d. WHEN A MAGISTRATE MAY ADMIT.

1st. *In case of white persons.*

A magistrate has no power to pardon an offender, or to admit him as a witness at all events against others. But where the evidence appears insufficient to convict two or more without the testimony of one of them, the magistrate may encourage the hope that he who will fairly disclose the whole truth shall himself escape punishment; and the hope held out by the magistrate is always confirmed by the Court, unless there be some important reason to the contrary.

2d. *In case of slaves.*

On the examination of two or more slaves for any offence, if the testimony be insufficient to warrant a conviction, a magistrate may admit any one who will make a full disclosure, to be a witness against the others, with promise of pardon to himself if he testifies fairly. The testimony of an accomplice should in all cases be received with Must be received with caution. caution, but more particularly in cases of slaves, as they testify not under oath; and it is better not to convict on the testimony of an accomplice, unless under the following restrictions :

1st. The circumstances, or positive proof other than that of the accomplice, should point to at least two persons as concerned in the offence. Starkie 2, 14.

2d. He should be confirmed by the circumstances of the case.—Ib.

3d. His statement be consistent with itself, and with the statement made at the time of disclosure.—Ibid.

3d. *After proceedings.*

If an accomplice confess and charge others, his statement should be carefully taken down in writing, and certified under the hand of the magistrate within two days; S. L., vol. 2, 483; 2 and 3 P. & M., c. 10. The confession should be taken down particularly and duly certified; because in case of the death of the accomplice, this confession may be evidence on trial of the others. He may be tried and convicted on this statement in case he fails to make a full and fair disclosure on trial of those concerned with him. After confession the accomplice should be committed as for trial, or bailed, if the offence be bailable; and the recognizance should be conditioned for his appearance to stand his trial with the others.

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A F F I D A V I T .

1st. Definition.

An affidavit is an oath in writing, sworn to before some person having authority to administer such oath.

2d. Form and Requisites.

For the form and requisites of an affidavit for any particular case, refer to the case.

It should be entitled of the district and State in which it is taken, and contain in full the names and residences of the party taking the oath, and others immediately concerned. It should be signed by the party taking the oath, and certified by the officer before whom it is taken, with the style of his office. If the party taking the oath know of the subject matter of his own knowledge, it should be stated positively; but if information be derived from others, the statement should be, "that he is informed and believes." But if the matter charged be only a conclusion from circumstances, the affidavit should be, "that he has just cause to believe, and doth believe." If the officer taking the affidavit be the person who is to act on it judicially, the circumstances inducing belief need not be set forth at length in the affidavit. But if it be intended for the judicial action of another, then the circumstances should be particularly set forth.

A F F I R M A T I O N .

Act 1731, S. L., v. 3, p. 281.

Any person who shall appear in any of the Courts of justice, or any judge or magistrate in this province, either as juror, witness, party or otherwise, in any cause, civil or criminal, and shall make a solemn and conscientious declaration and affirmation according to the form of his profession, in any matter, cause or thing wherein an oath is required by law, such solemn and conscientious declaration and affirmation shall be deemed, held, judged, and taken as valid and effectual to all intents, constructions, and purposes whatsoever, as if such person had taken an oath on the holy Evangelists of Almighty God, and that all and every such person and persons as shall be convicted of falsely and corruptly affirming and declaring any matter and thing, which, if the same had been an oath taken on the holy Evangelists, would by law amount to wilful and corrupt perjury, shall incur

the same penalties, disabilities and forfeitures, as persons convicted of wilful perjury do incur by the laws of Great Britain.

A F F R A Y .

An affray is the fighting of two or more persons in some public place, to the terror of the people. B. C., 4, 145.

Bare words do not amount to an affray; nor an assault which happens in a private place, out of the hearing or seeing of any, the parties excepted; nor the assembling one's neighbors and friends in one's house, against those who threaten to do such person some violence therein, nor to any person arming himself to suppress dangerous rioters, rebels or enemies, and who endeavors to suppress or resist such disturbers of the peace and quiet of the State. 1 Haw. 134, 135, 136. Words not.

If any one sees others fighting, he may lawfully part them, and stay them till the heat be over, and then deliver them to a constable to be carried before a justice, to find sureties for the peace; and if he receive any harm by the affrayers, he shall have his remedy by law against them; but if the affrayers receive hurt by his endeavors to part them, they have no remedy. 1 Haw. 136. 3 Inst. 158. Private person may.

A constable is bound at his peril to use his best endeavors to part an affray which happens in his presence, and also to demand the assistance of others, which if they refuse to give him, they are punishable with fine and imprisonment. 1 Haw. 137. Constable bound

If a constable see persons actually engaged in an affray, or upon the point of entering upon an affray, he may carry the offender before a justice, to find sureties for the peace; or he may imprison him of his own authority, for a reasonable time, till the heat shall be over, and he may also detain him afterwards till he find such surety. 1 Haw. 137. May carry before justice.

A constable has no right to lay his hands on those who barely contend with hot words, without any threats of personal hurt: but he may command them, under pain of imprisonment, to avoid fighting; neither hath a constable power to arrest a man for an affray done out of his own view, without a warrant from a justice, unless a felony were done, or likely to be done. 1 Haw. 137. Not unless in his view.

If an assault be made upon a constable, he may not only defend himself, but imprison the offender, in the same manner as if he were not a party concerned. 1 Haw. 137.

If an affray be in a house, the constable may break open the doors to preserve the peace ; and if affrayers fly to a house, he may follow, and break open the doors to take them. 1 Haw. 137.

Justice may. A justice of the peace may and must do all such things to the aforesaid purpose which a private man or constable are either enabled or required by the law to do : but he cannot, without a warrant, authorize the arrest of a person for an affray out of his own view, although he may issue his warrant to bring the offender before him, to compel him to give sureties for the peace. 1 Haw. 137.

All affrays in general are punishable by fine and imprisonment. 1 Haw. 138.

Warrant to apprehend Affrayers.

SOUTH-CAROLINA, }
District. } ss.

By A. P., magistrate, appointed to keep the peace in and for the said District.

To A. R., one of the constables of the District aforesaid.

Whereas A. I. hath this day made oath before me, that on the day of , in the year , A. O. of and B. O. of , at , in the said District, in a tumultuous manner made an affray, wherein the person of the said A. I. was beaten and abused by them the said A. O. and B. O. without any lawful or sufficient provocation given to them, or to either of them, by him the said A. I.: these are therefore to command you, forthwith to apprehend the said A. O. and B. O. and bring them before me, or some other of the justices assigned to keep the peace within the said district, to answer the premises, and to find sureties for their personal appearance at the next general sessions of the peace, &c., to be held for the district aforesaid, then and there to answer to an indictment to be preferred against them by the said A. I. for the said offence ; as also for their keeping the peace in the mean time, towards all the good people of this State, and especially towards him the said A. I. Hereof fail not, as you will answer the contrary at your peril.

Given under my hand and seal, at , in the district
aforesaid, the day of , in the year
of our Lord

A. P.

[L. s.]

ALIENS.

1st. WHO IS AN ALIEN, AND OF THEIR PRIVILEGES AND DISABILITIES.

2d. OF DENIZENS.

3d. OF NATURALIZATION AND OF THE RIGHTS AND DISABILITIES OF A NATURALIZED CITIZEN.

4th. PRECEDENTS.

1st. *Who is an Alien, and of their Privileges and Disabilities.*

An Alien is any person born out of the jurisdiction of the United States, who was not an inhabitant thereof at the time of the Declaration of Independence, or has not been admitted as a citizen according to the Act of Congress. Yet this must be understood with some limitation, for though a person be born without the limits of the United States, yet if his father be a citizen thereof, and have resided within its limits, the right of citizenship will descend to such person. 2 S. U. S. L., 853. An Alien is entitled to the protection of the laws, and owes obedience to them so long as he may remain under their jurisdiction. He may hold personal property, may loan money on mortgage of personal or real estate, and maintain a suit for its foreclosure. 4 S. L., 642. He cannot take real estate by descent. *Ennas vs. Franklin*; 2 Bre. R., 398; but may take by purchase, and hold until divested by escheat; and if, before escheat, he be admitted to the privileges of a citizen, such admission will confirm the title in him. *Laurens ads. Jenney and others*; 1 Spear, 356. He is not subject to jury duty, but unless he be a bona fide French citizen, (in which case he is exempt by treaty from all personal service,) he is subject to militia and police duty. By the Act of 1828, a widow alien may take *by descent or will the lands of a deceased husband*. 6th S. L., 363.

One born out of United States.

Not if father be a citizen.

Entitled to protection.

May hold personal property.

2nd. *Of Denizens.*

By the Act of 1799, an alien friend may become a denizen by becoming a resident of the State, by taking and subscribing the oath, or affirmation of allegiance before one of the judges of the Court of Common Pleas, who gives a certificate of the fact, which certificate must set forth the place of nativity and former residence of the party, and if given to a family, the name and age of each declared on the oath of the head thereof, shall be inserted, and such certificate should be recorded in the office of Secretary of State, either at Charleston or Columbia, within sixty days. A compliance with the requisites

How an Alien may become.

May hold
real estate.

of this act entitles the party to purchase and hold real estate, but not to vote at elections, or to hold any office of profit or trust in the State.

3d. Of Naturalization, and the rights thereby conferred.

Any free white alien friend may become entitled to most of the rights of a native born citizen, by complying with the various requisites of the Acts of Congress, in reference to naturalization. The requisites of the said Acts are as follows :

Residence of five years. 1st. That he shall, at the time of application, have resided within the United States for at least five years, and one year within the State or territory where he applies ; 2 S. U. S. L., 851; and it must have been a continuous term of five years immediately preceding his application, without his having been, at any time during said term, out of the territory of the United States, of which the Court must be satisfied by testimony other than that of the applicants, and that during that time he has behaved as a man of good moral character, attached to the principles and constitution of the United States, and well disposed to the good order and happiness of the same.—Ib. 1304, sec. 12.

Two years notice. 2ndly. That he shall, two years before his application, have declared on oath or affirmation, before some Court of record of one of the States, or of the territorial districts of the United States, or a Circuit or District Court of the United States, that it was bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, State or sovereignty, of which he may at the time be a subject.—Ibid, 851, sect. 1st and 3d ; 3 S. U. S. L., 1974. But if such applicant shall have resided within the United States for three years before arriving at the age of twenty-one years, he may after having resided in the United States for five years in all, and after he is of age, be admitted a citizen without such declaration of intention. *Provided*, that at the time of his application he shall declare on oath and prove to the satisfaction of the Court that it was bona fide his intention for three years previous to become a citizen of the United States.—Ibid, 1974, sec. 1st. Or, if an applicant can prove to the satisfaction of the Court

In case of
residence
before
twenty-one.

Residence
before 1812.

that he was resident in the United States before the 18th day of June, 1812, and by the oath or affirmation of witnesses, citizens of the United States, who shall be named in the record as witnesses, that he resided there for at least five years immediately preceding his application, such person may be admitted without proof of declaration of intention. The place of residence and the names of the witnesses must in such case be set forth in the records of the Court.

3dly. He shall, at the time of his application to be admitted, declare ^{Take the Oath.} on oath or affirmation, before one of the Courts aforesaid, that he will support the Constitution of the United States, and that he doth absolutely and entirely renounce all allegiance to every foreign prince, potentate, State or Sovereignty whatever, and particularly by name, the prince, potentate, State or Sovereignty whereof he was before a subject, which proceeding shall be recorded by the Clerk of the Court.

4thly. If the applicant has borne any hereditary title, or has been ^{Renounce Titles.} of any of the orders of nobility in the Kingdom or State from which he came, he shall make an express renunciation of his title or order of nobility in the Court to which his application shall be made.—2d S. U. S. L., 851. On complying with these requisites, the applicant will receive from the Clerk of the Court, under the seal thereof, a certificate of his naturalization, which naturalization entitles not only ^{Certificate.} the applicant but his children, who shall be under the age of twenty-one years, and dwelling in the United States at that time, to all the rights and privileges of native born citizens, except that he must have ^{Rights and disabilities.} been a citizen for three years before he can be a member of the House of Representatives, and five years before he can be a member of the Senate of this State; and to enable him to hold the office of Governor, he must have been ten years a citizen. In some of the States, he can never hold the office of Governor. He must have been seven years a citizen to entitle him to a seat in the House of Representatives, and nine years to one in the Senate of the United States, and can never be President of the United States.

4th. Precedents.

UNITED STATES OF AMERICA, }
State of South-Carolina. }

Notice of
Intention.

To the Honorable

and

Esq., Clerk of said Court.

The Petition of _____
aged _____ years, following
the profession or occupation of _____ : Respectfully sheweth,
That your Petitioner was born in _____, that he arrived
in the United States, to-wit, _____ That it is the *bona fide*
intention of your Petitioner to become a citizen of the United States
of America, being sincerely attached to the Constitution of the said
States, and is willing to renounce all allegiance and fidelity to every
foreign prince, potentate, State or Sovereignty, whatever, particularly
. That he has never borne any hereditary title, or

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been of any order of nobility whatever. He therefore prays your Honor to order that declaration of his intention to be registered, and the usual oath be administered to him.

BE IT SO.

THE UNITED STATES OF AMERICA, }
State of South-Carolina. }

Personally appeared _____, who
 being duly sworn, deposes that the contents of his petition are just
 and true, and that it is *bona fide* his intention to become a citizen of
 the United States of America, being sincerely attached to the Consti-
 tution of the said States, and to renounce forever all allegiance and
 fidelity to every foreign prince, potentate, State or Sovereignty, what-
 ever, particularly to
 whereof he is a

Sworn to in open Court, this }
day of 18 }

UNITED STATES OF AMERICA, }
South-Carolina District. }

Petition for
 citizenship.

To the Honorable

The petition of

aged _____ years, following the profession or occupation
 of _____ : Respectfully sheweth, That your
 petitioner was born in _____, that he arrived

[*Here insert the place and time of arrival, and set forth the decla-
 ration of intention, or the arrival under eighteen years of age.*]

That your petitioner is desirous of becoming a citizen of the United
 States of America, being sincerely attached to the Constitution of the
 said States, and is willing to renounce all allegiance and fidelity to
 every foreign prince, potentate, State or Sovereignty, whatever, par-
 ticularly _____ . That he has never borne

any hereditary title, or been of any order of nobility whatever. He,
 therefore, prays your Honor to admit him a citizen of the United
 States, and that the usual oath be administered to him.

A. B.

We, the subscribers, citizens of the United States of America, do
 hereby certify, that we have known the petitioner
 for _____ years last past, during which time he has resided
 within the United States, to wit, _____ and within this
 State upwards of one year. That he has behaved during that time,
 as a man of good moral character, attached to the principles of the

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Constitution of the United States, and well disposed to the good order and happiness of the same.

Sworn to before me this

A P P E A L.

An appeal is the application to a higher Court to reverse the decision of a lower, upon certain grounds set forth in the notice of such application, and made to appear by report of the cause by the presiding officer of the Court below. Definition.

1st. IN WHAT CIVIL CASES APPEAL LIES.

2d. NOTICE, BOND, REPORT, &c.

3d. CRIMINAL CASES.

1st. In what Civil Cases appeal lies.

In all cases tried before a magistrate, where the demand sued for exceeds the sum of two dollars, either party dissatisfied, may have an appeal to the Common Pleas. Act 1839, p. 18, sec. 16 All cases over \$2.

By sec. 25, p. 22 of the same Act, the right of appeal in cases between master and apprentice, is preserved. In cases between landlord and tenant, for holding over, and in forcible entry and detainer, there is no appeal. Act 1812, 5 S. L., 677. In cases of Master and Apprentice. None in Landlord and Tenant.

2d. Notice, Bond, Report, and so forth.

The notice of appeal from the decision of a magistrate, should be within two days after the decision. Act 1839, p. 18. After notice, the party is entitled to two days to give bond and sufficient security. The sufficiency of the surety to be determined by the magistrate. The bond should be in the following form. Act 1839, p. 18.

STATE OF SOUTH-CAROLINA, }
District. }

A. B. }
vs. } Appeal from Magistrate.
C. D. } A. B. or C. D., Appellant.

I (or we) hereby agree to stand security for the appellant in this case.

Signed in the presence of }
E. F., }
Magistrate. }

[L. s.]
[L. s.]

If the appellant fail in his appeal, he and his surety become liable to immediate execution from the Court of Common Pleas for the costs,

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or the debt, interest, and costs as the case may be. After notice and taking bond, the magistrate should make a report of the case, carefully stating all the material testimony, with the reasons of his decision, which report, with the bond, should be lodged by him in the office of the Clerk of Common Pleas, before the term of the Court next ensuing.

3d. In Criminal Cases.

None except
in capital
case.

No appeal is allowed in any criminal case, before a magistrate, except it be on conviction for a capital offence. By the Act of 1833, when any slave or free person of color shall be convicted of a capital offence, and sentenced to suffer death, application in his behalf may be made to any one of the circuit judges or judges of the Court of Appeals, either in open court or at Chambers, for a new trial. And a full report of the case shall be made and attested by the justices who preside at the trial, upon application therefor, and the execution of the sentence shall be suspended; and if from the said report, or from that, in connection with satisfactory affidavits of matters not therein stated (which affidavits shall be shewn to the justices before they are presented to the judge,) it shall appear to the judge that the conviction has been erroneous, the prosecution shall be as in case of a new complaint, provided that no one of the justices or freeholders, who served on the first shall serve on the subsequent trial.

APPRENTICE.

1st. Who may take.

Any person of any lawful employment, calling, art, mystery, or trade, may take an apprentice; 3 S. L., 544.

2d. Deed and Requisites.

Father,
Mother, &c.,
must
approve.

Any infant may be bound an apprentice by deed of indenture certified under the hand and seal of a magistrate. The deed should set forth the presence and approbation of the father, mother, or guardian of such infant; and if the infant have neither father, mother, or guardian, then the presence and approbation of the grandfather, grandmother, brother, sister, uncle or aunt, of mature age, or the approval of the magistrate before whom it is executed, each in the order above enumerated. The other matters chiefly to be contained in the deed of indenture, are the full names of the parties, the trade to be taught, the term of service, and the provision for the apprentice.

3d. Who may bind poor apprentices.

Be it enacted, that the Commissioners of the Poor shall have power to bind out to service illegitimate children, and children of paupers, in all cases where such children are likely to become chargeable to the district, or are liable to be demoralized by the vicious conduct and evil example of their mothers, or other persons having the charge of them; and it shall be the duty of the Commissioners of the Poor in each and every district of this State, upon information made to them that any legitimate child above the age of five years is likely to become chargeable to the district, or from the vicious conduct and evil example of the mother of said child, or other person having it in charge, is likely to become demoralized and brought up in vice and idleness, to cause such child to be bound to service in charge of some person of good character, a female child until she attains the age of sixteen years, and a male child until he attains the age of seventeen years. Act 1830, 6th S. L., 410.

By the Act of 1831, 6th S. L., 432, the term for which a female may be bound, is extended to the age of eighteen, or until she marries, and the male to the age of twenty-one years.

4th. When and how indentures may be assigned.

On good reason shown for the transfer of an apprentice, or if the master or mistress be dead. The indenture may be assigned in the first case by the master or mistress, and in the latter by the executor or administrator. The assignment should be before a magistrate, who should certify under his hand and seal the presence and approbation of the party whose assent would be necessary to bind said apprentice. Act 1839, p. 22.

5th. Relative duties of Master and Apprentice.

An apprentice owes obedience to all the lawful commands of his master; and if he be disobedient, he may be moderately corrected by the master, though any unnecessary violence or degradation would be illegal; nor can the authority be delegated; 1 Chit., 71. So the whole service of the apprentice is due to the master; and if the apprentice absent himself from the master's service, his earnings are the master's; Burn's Justice, 101. If an apprentice desert his master and work for another, the master may sue as for hire; Lightly vs. Clauston, 1 Taun., 112. It is the duty of the master to instruct the apprentice; but his liability for food, clothing, lodging, and so forth, will depend on the terms of the binding; and a stipulated amount in

money is frequently given in lieu of all other liabilities. Upon an ordinary covenant to furnish an apprentice meat, drink, clothing, lodging and washing, the master is not bound to furnish medical attendance, and would not be liable for a physician's bill, unless he was employed at the instance of the master. *Percival vs. Noviter*, 1 N. & M. 452. By the Act of Assembly of 1841, page 210, every person to whom any male white apprentice, liable to militia duty is bound, is required to furnish him during the time of his servitude, with the arms and equipments prescribed by the Act of Congress, and to compel him, duly armed and equipped, to attend all drills and musters as he may be required by law, and in default of his attendance, or deficiency of his arms, the master shall be liable to the fine imposed on a private. If the master has done his duty in this respect, and the apprentice fail to appear, or appear without such arms and equipments, two weeks shall be added to his term of servitude for every such failure, and if he embezzle, sell, or make away with his arms or equipments, besides being liable for the value thereof, he is liable to indictment, and on conviction, to a fine not exceeding fifty dollars, and to imprisonment not exceeding one month.

6th. Matters of difference between Master and Apprentice.

On complaint made by an apprentice, charging his or her master or mistress with misuse, or by the master or mistress against such apprentice, before any two magistrates of the district, setting forth the cause of such complaint, it shall be the duty of such magistrates to make such order between the parties as the equity and justice of the case may require, subject nevertheless to the right of either party to appeal from such order to the Court of Common Pleas for the district, at the next ensuing term; A. A. 1839, p. 22. Concerning which, it is to be inquired how far the general terms of this act extends the power of the magistrates. Observe that the Act of 1740, P. L., 177, gives the same general power with the right of appeal to the chief justice, and two assistant judges; with the further proviso, that if it seem fit to them, they may discharge the apprentice, or administer to him due punishment and correction.

Now, since the Act of 1839 is silent in these particulars, and makes the jurisdiction of the Common Pleas only appellat in the matter, it may well be inferred that the power of punishing the apprentice, or of discharging him from his indentures, is extended by it to the magistrate. See *Belcher et ux vs. Commissioners*; 2 Mc. 23. If it appear that the treatment of an apprentice by the master or mistress has been

7th. Forms.

In witness whereof, the said parties have interchangeably set their hands and seals hereunto. Dated the _____ day of _____ in the year of our Lord one

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thousand eight hundred and and in the

year of the Sovereignty and

Independence of the United States of America.

Signed, sealed, and delivered, }
in the presence of

$$\begin{bmatrix} \text{L.} & \text{S.} \\ \text{L.} & \text{S.} \\ \text{L.} & \text{S.} \end{bmatrix}$$

Assignment of Indenture.

The simplest form is by assignment on the indenture, as follows :

I, A. B. (master or mistress, or executor or administrator of C. D., master or mistress) of E. F., the within named apprentice, by and with the consent and approbation of B. D., his father, or mother. or guardian, and so forth, as the case may be, for divers good causes and considerations, we hereunto moving, do hereby assign, transfer, and set over unto A. S., all right, title, duty, and term of service, which I have in the said apprentice, by virtue of the written indenture ; the said A. S. binding himself well and truly to perform all the duties and obligations required of the master by the within indenture.

Dated at the day of 184

Signed and sealed in	(The Apprentice,)	[L. s.]
the presence of	(The Father,)	[L. s.]
(B. C.) [L. s.]	(The Master or Executor,)	[L. s.]
Magistrate.	(The Assignee,)	[L. s.]

Complaint of an apprentice to two justices of his master.

District, } s. s.

The information and complaint of A. P., apprentice to A. M., of _____ in the said district, carpenter, taken and made *(say on oath if he is not above fourteen years of age)* before us, two of the justices assigned to keep the peace in and for the district aforesaid, the _____ day of _____, in the year _____, who saith, that he the said A. P., about twelve months ago last past, became bound an apprentice by indenture to A. M. of _____, in the district of _____, carpenter, that at several times since he entered upon the said apprenticeship, the said A. M. hath misused and ill treated him the said apprentice, and particularly (here recite the circumstances in particular of the ill treatment complained of.)

Taken and signed the day and }
year aforesaid before us. }
H. P.
R. S.

A. P.

*Warrant against the Master for misusing his Apprentice.**District.* } ss.

By H. P. and R. S., two of the justices assigned to keep the peace in and for the district aforesaid—To all and singular the constables of the said district.

Whereas complaint hath been duly made unto us, by A. P. apprentice unto A. M. of _____, in the said district, carpenter, that the said A. M. hath misused and evil entreated him the said A. P. by cruel punishment (and beating him, the said A. P. without just cause, or by not allowing to him the said A. P. sufficient meat, drink and apparel, as the case may be.)

These are, therefore, to command you, to cause the said A. M. personally to appear before us, at the house of _____, on the day of _____, at the hour of _____ in the morning of the same day, to answer to the said complaint; and also to cause the said apprentice to appear before us at the same time and place, to make good his said complaint. Hereof fail not, as you will answer the contrary at your peril. Given under our hands and seals this _____ day of _____, in the year _____

H. P. [L. s.]

R. S. [L. s.]

*Complaint of the Master against his Apprentice to two justices.**District.* } ss.

The complaint of A. M. of _____, in the district aforesaid, carpenter, taken on oath, before us H. P. and R. S. two of the justices assigned to keep the peace in and for the district aforesaid, the _____ day of _____, in the year _____, who saith, that A. P., apprentice by indenture to him the said A. M., hath in the service of his apprenticeship, been guilty of several misdemeanors, miscarriages and ill behavior, and hath been refractory and disobedient to him, the said A. M., and particularly (here recite the circumstances in particular of the ill behavior complained of.)

A. M.

Taken and signed the day and year aforesaid, before us.

H. P.

R. S.

*Warrant against the Apprentice on complaint of the Master.**District.* } ss.

By H. P. and R. S., two of the justices assigned to keep the peace in and for the district aforesaid.

LAW OF MAGISTRATES.

Whereas complaint hath been duly made unto us, by A. M. of
 , in the district aforesaid, carpenter, that A. P., now
 being an apprentice to him the said A. M. hath been guilty of several
 misdemeanors, miscarriages and ill behavior, or is refractory and
 disobedient (as the case may be) to him the said A. M. his master ;
 these are to command you to bring the said apprentice before us at
 , on the day of , at the hour
 of in the morning of the said day, to answer to the said
 complaint, and to be dealt with according to law ; and you are to
 give notice to the said master, that he appear before us at the same
 time and place, to make good the said complaint. Hereof fail not,
 as you will answer the contrary at your peril. Given under our
 hands and seals this day of , in the year

H. P. [L. s.]
 R. S. [L. s.]

ARBITRATION.

Arbitration is where the parties submit their matter of controversy
 to the judgement of two or more arbitrators, and if they do not agree, it
 is usual to add that another person be called in as umpire, to whose
 sole judgment it is then referred.

- 1st. WHO MAY SUBMIT TO ARBITRATION.
- 2nd. WHAT MAY BE SUBMITTED.
- 3d. SEVERAL VARIOUS MODES OF SUBMISSION.
- 4th. REVOCATION.
- 5th. POWER AND DUTIES OF THE ARBITRATOR.
- 6th. UMPIRE.
- 7th. THE AWARD.
- 8th. FORMS.

1st. *Who may submit to Arbitration.*

Married
 women, &c.
 may not.

Persons who cannot contract, cannot submit to arbitration. Therefore
 married women, and persons compelled by threats and imprisonment,
 cannot submit ; Burns' Justice, 136. The husband may submit the
 chattels he has in right of his wife ; for he may dispose of them—he
 may also submit to arbitration chattels, which the wife has, as executrix
 or administratrix.—Ibid. If an infant submit to arbitration, he may
 execute or avoid it at his election.—Ibid. An executor or adminis-
 trator may submit matters to arbitration, and the award will be bind-
 ing on the estates they represent.—Swicard vs. Adm's of Swicard.
 2 M. Con., 218.

2nd. What may be submitted.

All matters of controversy, either of fact or of right, to things and actions personal and uncertain, may be submitted to arbitration. Matters certain and uncertain. Matters certain may also be submitted in connection with matters uncertain. Causes, criminal, are not determinable by arbitration, because the perpetrator of crimes should be made known and punished for the common good; and the State, in such cases, is a party for whom the other parties cannot undertake. But if the injured party proceeds, by way of action, as he may in assaults and batteries, libels and the like, the damages may be submitted to arbitration. Criminal causes not. Matters relating to the contract or dissolution of marriage, cannot be submitted to arbitration. Except personal damage. But the damages a person may have sustained by a promise of marriage, or any thing relating to a marriage portion, may be submitted; Burns' Justice, 137-'38. Whether a dispute concerning a freehold, may be submitted to arbitration, by parol, is undetermined, but it may be submitted by deed. Realty. Leatherwood vs. Woodruff, 2 Brev. R., 380.

3d. Various modes of submission.

A submission by words is good, and the party in whose favor the award is made, has a remedy to enforce the performance of it. By words. Yet it is not expedient that any submission should be by parol, because either party may, by words, revoke it at any time before the award is made.

Submission may also be made by covenant, but this method is not often practised. By covenant

Submission, by rule of Court, is made in pursuance of the statute 9 and 10 Wil. c. 15, which is as follows: "It shall be lawful for all merchants and traders, and others, desiring to end any controversy, suit or quarrel (for which there is no other remedy but by personal action, or suit in equity) by arbitration, to agree that their submission to the award, or umpirage, be made a rule of any of his Majesty's courts of record which the parties shall choose, and to insert such agreement in their submission, or the condition of the bond, or promise, whereby they submit themselves; which agreement being so made, and inserted in their submission, or promise, or condition of their respective bonds, shall or may, on producing an affidavit thereof, made by the witnesses thereunto, or any of them, in the Court of which the same is agreed to be made a rule, and reading and filing the said affidavit in Court, be entered of record in such Court; and a rule shall thereupon be made by the said Court, that the parties shall

submit to, and finally be concluded by such arbitration, or umpirage : and in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform the same, or any part thereof, shall be subject to all the penalties of contemning a rule of Court ; and the Court on motion shall issue process accordingly ; which process shall not be stopped or delayed in its execution, by any order of any other Court of Law or Equity, unless it shall be made appear, on oath, to such Court, that the arbitrators or umpire misbehaved themselves, and that such award was procured by corruption or other undue means.

And this is allowed to be the most expeditious way; and the method is to get a counsel to move in any of the Courts to have it made a rule, which, in such case, is never denied : and then the party is liable to the same penalties that he would be for disobeying any other rule of Court. Compl. Abr., 6, 47.

Although this statute of William is not made of force in this State, yet the proceedings of the Courts in cases of awards, have hitherto been conducted agreeable to this statute, until January term, 1787, when the following rule was made by the Court.

Upon the return of an award, or umpirage, a one day rule shall be served upon the party, or his attorney, against whom the award or umpirage shall be made, to show cause why the award or umpirage should not be confirmed ; and if the award or umpirage should be confirmed by the Court, then judgement shall be thereon entered, and execution issued against the body or goods of the party, in the same manner as if a judgement had been obtained by verdict of a jury ; by which the proceedings pointed out by the Act of Parliament, upon the return of the award, is hereby altered ; as, instead of an attachment, the process is by judgement and execution against the body or goods of the party. 40th Rule.

The agreement to a reference must be expressed with great caution and accuracy; for if it is agreed to refer *all matters in difference between the parties in the cause*, the arbitrators are not confined to the subject of the cause alone, as they are when it is agreed to refer *all matters in difference in the cause between the parties*. 2 T. R., 645.

Yet after an award under a reference in the first case, either party may maintain an action for a right or demand subsisting at the time of the reference, but not disputed or referred to the arbitrators. 4 T. R., 146.

By Bond.

The best and most usual mode of submission is by bond, in which case, each party must give the other a bond, both of which must con-

tain exactly the same words, only changing the names. And the penalty of the bond should exceed the amount in dispute, or the value of the thing submitted, so as to cover the award and damages for refusal to comply. Burns, J., 140.

4th Revocation.

A submission by words may be revoked at pleasure, and the party revoking forfeits nothing; but it will be necessary for him to give notice of the revocation, though it need not be in writing, and such notice must be to the arbitrators themselves. Burns, 141. By notice.

A submission by deed may be revoked by deed, and notice of revocation before award made, but the arbitrators are right in afterwards proceeding to award, because the party continuing in submission is entitled to his action for damages on non-performance of the covenant to stand by the award. So, if bound in a penalty, the penalty is not avoided by the revocation. King vs. Joseph, 5 Taunt, 452. Arbitrators to proceed in some cases.

Under the Rule of Court, there is no provision for a case of revocation, but the probabilities are, that in such case, the Court would proceed to judgment on the award, unless for good cause shewn to the contrary. Under Rule.

The death of either party, at any time before the award, determines the power of the arbitrators. 2 Tidd, p. 877. By death.

If a woman submit a matter to arbitration, and marries before award made, it will be a revocation, and if another be concerned with her, it will be a revocation as to that person also. Burns' Justice, 141. By marriage.

5th. Power and Duties of Arbitrators.

As to evidence, arbitrators have no power to administer an oath, and a person cannot be indicted for perjury on an oath taken before them; State vs. McCroskey, 3 Mc. 308. They may examine the parties as witnesses, unless this is expressly guarded against by the submission; Askew vs. Kennedy, 1 Bail., 46. If they examine the parties, they may also examine a witness, who is interested. Lloyd vs. Archbowl, 2 Taunt, 324. Not administer oath. May examine the parties.

All the witnesses of a party must be heard, or it will be good ground for setting aside the award. Bedingson vs. Southall, 4 Price, 232. Must hear all the witnesses.

As to matters referred, the power of the arbitrator is confined to the matters submitted, and if the submission be by deed or bond, the terms thereof cannot be extended by parol; Sessions vs. Barfield, 2 Bay, 94. But with respect to matters submitted, they may go farther than the Court to do complete justice, and therefore may relieve against a harsh right. Knox vs. Symonds, 1 Ves., Jun., 367. Confined to matters referred. May relieve in harsh case.

So they may put the law out of the question and award the payment of a conscientious demand, though it be not binding in law. *Delor vs. Barnes*, 1 Taunt, 48.

Award
Interest.

An arbitrator may award interest, though on a matter not bearing interest in law. *In re Bodger* 2 B. & A. 691.

Also
compound.

So also, he may allow compound interest on a contract for it, either expressed or to be inferred from the nature of the dealings between the parties. *Morgan vs. Master*, 2 Ves., Jr.; 15.

One party
absent.

An arbitrator may award costs without any express authority for that purpose; *Roe & Wood vs. Doe*, 2 T. R., 644. If one of the parties will not attend, he may proceed *ex parte* without giving him notice. *Harcourt vs. Ramsbottom*, 1 J. and W., 512.

6th. *Of the Umpire, his Power and Duties.*

By the
parties.

An umpire is either chosen by two persons disputing, or by the arbitrators, according to the terms of the submission. Where the umpire is chosen by the parties, it is usual to name him at the same time that the arbitrators are chosen. But when by the terms of the

By arbitra-
tors.

submission the arbitrators have power to choose, it may be done either before they enter upon the matter referred, or at any time before award; *Peck vs. Wakely*, and *Wilson*, 2 McCord, 279. The umpire must be by actual choice of arbitrators, and choosing by lot between two persons named, is not good.

Not by lot.

May decide
on report.

The umpire is governed by the same rules of evidence, and has the same power over the subject matter as has been set forth in treating of the power and duties of arbitrators, with this exception, that he may proceed to determine the matter referred, upon the report of the arbitrators, and without re-examining the witnesses, unless he is directed to do so by the terms of the submission, or it is required of him by one of the parties before he makes his award. *Sharp vs. Lipsey*, 2 Bail., 113.

7th. *Of the award, how it may be made, and for what.*

Rules of.

The award should be in writing, and its requisites are, that it be, 1st. According to the very terms of the submission, in respect to the persons and things submitted. 2ndly. It ought to be equal and not on one side only, for it must appoint either party to give or do something beneficial or advantageous. 3dly. The performance must be legal and possible. 4thly. There must be a means, by law, to attain to the thing awarded, and this is chiefly meant where the submission is without bond. 5thly. It ought to be certain and final, and make an end of all controversies submitted, or if it is good only in

reference to part of the things submitted, it must be final as to that part, or it will be void. Burns' Justice, 142.

First. An award should be according to the submission, for if an award be made of any other thing than what is contained in the submission, it is void. According to submission.

Secondly. An award should be equal; this should be understood Equal. thus; that all controversies being between two parties, that which is awarded to be done to one must be an advantage to both, so as to end the controversy, and discharge one as well as give satisfaction to the other; for if it does not, it is manifestly unjust, and therefore whenever it appears to the Court that notwithstanding the award, the thing remains a duty as before, and is not discharged, that apparently is an award on one side, and consequently void. Not that where one party is by the award to have something paid him and not the other; that that award should be naught, for perhaps nothing may be due to him. Burns' Justice, 145.

Thirdly. The performance of the award should be legal and possible. Legal and possible. If the arbitrators award any thing impossible, it is void,—as, that one of the parties shall do a thing which is out of his power. If the thing become impossible by the act of God, the party is excused.

Fourthly. There must be a means by law to attain the thing awarded. Means by law.

If it be awarded that a person shall procure a stranger to do a thing, and he has no means by law to compel the stranger to do it, the award is void, but if he has means to compel the stranger, the award is good. So an award that he shall be bound with sureties, is void as to the sureties.

Fifthly. An award ought to be certain and final, for if it does not determine the matter, it becomes a new controversy. Burns' J., 147. Certain and definite.

An award may be by a majority of the arbitrators, and it is not necessary that all should concur. Black ads. Pearson, 1st M., 137. By majority.

An award will not be set aside, except for corruption or partiality in the arbitrators, or for some manifest error committed by them. Corruption. Askew vs. Kennedy, 1 Bail., 46.

Awards are not to be set aside, unless for corruption or misbehavior in the arbitrators; except in cases of gross errors or mistakes, the Court will always construe them liberally, and not scan them too nicely, so as to defeat the ends of the reference, but will lend every aid to carry them into execution. Gross errors.

It is a general rule in equity, that when it appears that any one of the arbitrators was any way interested in the matters in controversy, the award is to be set aside. Compl. Arb. 75.

Present by
one party.

And it is the strongest argument of partiality, to show that the arbitrators received, from either of the parties, any considerable sum of money, or any other present, which may be a temptation to act corruptly ; but the sum or present must be proved to be so exorbitant, as to induce the Court to believe that it biassed their judgments, otherwise it will be of no effect. Compl. Arb., 76.

In the case of Shepherd and Brand, T. 7, G. 2, on a rule to show cause why an award should not be set aside, one exception was, that before making the award, the arbitrators insisted upon three guineas apiece, to be paid to them by each of the parties, for their trouble and expenses ; that the defendant refused doing it on his part, upon which the plaintiff paid the whole money : by the Court ; where arbitrators, let their characters be otherwise never so unexceptionable, take money of one of the parties singly, whether for charges or any thing else, before making their award, as this is a matter of so tender a nature, that even the appearance of evil is to be avoided, and this practice may be of dangerous example, it is sufficient cause to set aside the award ; for if this should be suffered, it will be hard to distinguish what is corruption. 2 Barnardist, 463. Cases in the time of Lord Hardwicke, 54.

8th. Forms.

In pursuance of the within Rule of Court to us directed, we W. C. and J. C., in obedience thereto, having examined all matters in difference between the said parties, antecedent to the death of the said H. C., do award that the sum of thirty pounds, fifteen shillings and five-pence, sterling money, is due to the said G. D., from the estate of the said H. C. deceased. Witness our hands and seals, the
day of _____, in the year _____

Witness,
I. H.

I. C.
W. C.

Rule of Court.

G — D —
vs.
Ex'ors. H — C —, dec. } CASE. IN THE COMMON PLEAS.

On motion of Mr. W _____, attorney for the plaintiff, and by consent of Mr. C _____, attorney for the defendants, *Ordered*, That all matters in difference between the parties, on which this action is founded, together with costs of suit, be submitted to the determination, final ending, and award of Messrs. I. C. and W. C. That the said

arbitrators, provided they agree, do make, and return their award, under their hands and seals, to the office of the clerk of this Court, on or before the first day of October term next; and in case they cannot agree, that then the said arbitrators shall have leave to choose an umpire, who shall make and return his umpirage as aforesaid, on or before the day of next ensuing.

Arbitration Bond.

Know all men by these presents, that I, A. B. of , in the district of , gentleman, am held and firmly bound to C. D. of , in the district of , yeoman, in pounds of good and lawful money of the State of South-Carolina, to be paid to the said C. D., or to his certain attorney, his executors, administrators, or assigns; to which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents. Sealed with my seal, and dated the day of , in the year

Condition to stand to the award of two arbitrators, in common form.

The condition of the above obligation is such, that if the above bound A. B., his heirs, executors, and administrators, and each and every of them, for and on his and their parts and behalfs, do and shall well and truly stand to, obey, abide, perform, observe and keep the award, order, arbitrament, final end, and determination of A. A., of , Esquire, and B. A. of , gentleman, arbitrators indifferently named, elected and chosen, as well for and on the part and behalf of the above bound A. B., as of the above named C. D., to arbitrate, award, order, adjudge, and determine, of and concerning all and all manner of action and actions, cause and causes of action and actions, suits, bails, bonds, specialties, judgements, executions, accounts, debts, dues, sum and sums of money, quarrels, controversies, trespasses, damages and demands whatsoever, which at any time or times heretofore have been had, made, moved, brought, commenced, sued, prosecuted, committed, omitted, done or suffered by or between the said parties, so as the said award be made in writing, and ready to be delivered to the said parties, on or before the day of now next ensuing, [and if the said A. B., his heirs, executors or administrators, or any of them, shall not prefer, or cause to be preferred, any bill in Equity against the said A. A., B. A., or either of them, for or concerning their award in the premises,] then this obligation to be void, otherwise of force.

If the parties have a mind to make their submission a Rule of Court, then this may be added :

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And the above bound A. B. doth agree and desire, that this, his submission, be made a Rule of the Court of Common Pleas at Charleston.

Condition to stand to the award of three arbitrators, or any two of them, and an umpire appointed.

The condition of this obligation is such, that if the above bound A. B., his heirs, executors and administrators, for and on his and their parts and behalfs, shall and do well and truly stand to, obey, abide, observe, perform, fulfil, and keep the award, order, arbitration, final end, and determination of _____, or any two of them, arbitrators indifferently elected, and named, as well by and on the part and behalf of the said A. B., as by and on the part and behalf of the above named C. D. to arbitrate, award, order, judge and determine, of and concerning all, and all manner of action and actions, cause and causes of action and actions, suits, bills, bonds, specialties, covenants, contracts, promises, accounts, reckonings, sums of money, judgements, executions, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending, by or between the said parties, so as the award of the said arbitrators, or any of them, be made and set down in writing, under their, or any two of their hands and seals, ready to be delivered to the said parties in difference, on or before the _____ day of _____ now next ensuing, then this obligation to be void, otherwise of force.

And if the said arbitrators shall not make such their award, of and concerning the premises, within the time limited as aforesaid, then if the said A. B., his heirs, executors, and administrators, for and on his and their part and behalf, do and shall well and truly stand to, observe, perform, fulfil, and keep the award, determination, and umpirage [if the umpire be named] of _____, being a person indifferently named and chosen between the said parties for umpire; [if not named] of such person as the said arbitrators shall indifferently choose for umpire in and concerning the premises, so as the said umpire do make and set down his award and umpirage in writing, under his hand and seal, ready to be delivered to the said parties in difference, on or before the _____ day of _____ now next ensuing; and if the said A. B., his heirs, executors, or administrators, or any of them, shall not prefer or cause to be preferred, any bill in equity against them the said arbitrators and umpire, or any of them, for or concerning the award of them the said arbitrators or umpire, in the premises, then this obligation to be void, otherwise of force.

And the above bound A. B. doth agree and desire, that this his submission be made a Rule of the Court of Common Pleas at Charleston.

Form of an award in full.

To all to whom these presents shall come: we, A. B., of _____, and C. D., of _____, do send greeting.

Whereas there are several accounts depending, and divers controversies have arisen between _____, of _____, yeoman, of the one part, and _____, of _____, yeoman, of the other part; and whereas, for the putting an end to the said differences, they the said _____ and _____, by their several bonds or obligations, bearing date _____ last past, are reciprocally become bound each to the other in the penal sum of _____, to stand to, abide, perform, and keep the award, order, and final determination of us the said _____, so as the said award be made in writing, and ready to be delivered to the parties in difference on or before _____ next ensuing, as by the said obligations and conditions thereof may appear: Now know ye, that we the said arbitrators, whose names are hereunto subscribed, and seals affixed, having taken upon us the burden of the said award, and having fully examined and duly considered the proofs and allegations of both the said parties, do make and publish this our award, between the said parties, in manner following; that is to say, we do award and order, that all actions, suits, quarrels, and controversies whatsoever, had, moved, arisen, and depending between the said parties, in law or Equity, for any manner of cause whatsoever, touching the said premises, to the day of the date hereof, shall cease and be no further prosecuted; and that each of the said parties shall pay and bear his own costs and charges, in anywise relating to or concerning the premises. And we do also award and order, that the said _____ shall deliver or cause to be delivered to the said _____, at _____ within the space of _____, &c. And further, we do hereby award and order, that the said _____ shall, on or before _____, pay, or cause to be paid unto the said _____, the sum of _____. We do also award and order, &c., and lastly, we do award and order, that the said _____ and _____, on payment of the said sum of _____, shall in due form of law, execute each to the other of them, or to the other's use, general releases, sufficient in the law for the releasing of each to the other of them, his heirs, executors, and administrators, of all actions, suits, arrests, quarrels, controversies, and demands whatsoever, touching or concerning the premises aforesaid, or any matter or thing thereto relating, from the beginning of the world until the _____ day of _____ last past (viz., the day of

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the date of the arbitration bonds.) In witness whereof, we have hereunto set our hands and seals, the day of in the year

Witness hereof,

A. B.

C. D.

Form of an Umpirage.

(Recite the arbitration bonds as before.) Now know ye, that I , umpire, indifferently chosen by , having deliberately heard and understood the griefs, allegations and proofs of both the said parties, and willing (as much as in me lieth) to set the said parties at unity and good accord, do by these presents arbitrate, award, order, decree, and judge, as followeth, this is to say, &c.

 A R M S, F I R E.

1st. AS TO WHITE PERSONS.

2nd. AS TO SLAVES AND FREE PERSONS OF COLOR.

3d. PRECEDENTS.

1st. As to White Persons.

Firing in
night time.

If any person shall shoot off any gun or pistol in the night time, after dark, and before day-light, without necessity, every such person shall forfeit the sum of forty shillings for each gun so fired, as aforesaid, to be recovered by warrant from any one justice of the peace of the county where the offence is committed, according to the direction of the act for the trial of small and mean causes. 7 S. L., 412.

Exempt from
seizure.

All arms and equipments, required by law, and horses used in the performance of military duty, are exempt from seizure, distress and execution, and the person seizing the same is liable to a penalty of fifty dollars, recoverable by indictment. A. A., 1841, p. 210.

2nd. As to Slaves and Free Persons of color.

May not
carry
w thout
ticket.

By the Act of 1819, 6th S. L., 539, it is enacted that it shall not be lawful for any slave, except in the company and presence of some white person, to carry or make use of any fire-arms or other offensive weapon, unless such slave shall have a ticket or license in writing from his owner or owners, or be employed to hunt and kill game, mischievous birds or beasts of prey, within the limits of his master's plantation, or shall be a watchman in and over his owner's fields or plantation.

And in case any white person shall find any slave using or carrying any gun or other offensive weapon, contrary to the intent and meaning of this act, he, she or they may lawfully seize such gun or other offensive weapon, and convert the same to his, her or their own use; but before the property of such goods shall be vested in the person who shall seize the same, such person shall, within forty-eight hours after such seizure, go before the next justice, and shall make oath of the manner of taking; and if such justice of the peace, after such oath shall be made, or if upon any other examination, he shall be satisfied that the said fire-arms or other offensive weapons shall have been seized according to the directions, and agreeable to the true intent and meaning of this act, the said justice shall, by certificate under his hand and seal, declare the forfeiture, and that the property is lawfully vested in the person who seized the same; provided that no such certificate shall be granted until the owner or owners of such fire-arms, or other offensive weapon, so seized as aforesaid, or the overseer or overseers, who shall or may have charge of such slave or slaves, from whom such fire-arms or other offensive weapon shall be taken or seized, shall be duly summoned to show cause (if any such they have,) why the same should not be condemned as forfeited, nor until forty-eight hours after the service of such summons, and oath made of the service thereof before the said justice.

Seizure.

After proceedings.

Certificate of justice.

Notice to owner, &c.

By Act of 1843, page 258, the time for going before the magistrate is extended to ten days; also, the notice to the owner; and the weapon seized is liable to forfeiture to the use of the regiment.

No free negro, or other free person of color, shall carry any fire-arms or other military or dangerous weapon abroad, except with a written ticket from his or their guardian, under pain of forfeiting the same, and being fined or whipped, at the discretion of any magistrate and three freeholders, before whom he or they may be convicted thereof. 1835, 7th S. L., 474.

3d. Precedents.

1st. Form of summons for firing guns in the night time.

SOUTH-CAROLINA, }
District. } To any lawful Constable.

Complaint having been made to me that A. B. did, on the night of , the day of , after dark and before day-light, without necessity shoot off a gun, whereby he has forfeited to the Commissioners of the Poor for district, the sum of forty shillings. These are, therefore, to authorize and require you to summon

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the said A. B., to be and appear before me at _____, on
 next, the _____ day of _____, at _____ o'clock, to answer the said
 charge. Given under my hand and seal, this _____ day of _____ A. D.
 C. D. [L. s.]
 Magistrate.

2nd. Affidavit in case of weapon taken from a slave.

STATE OF SOUTH-CAROLINA, }
 District. }

Personally appeared before me, A. B., who being duly sworn,
 deposeth, and says that within ten days last past, he seized and took
 from D., slave of C. D., a (here describe the gun or weapon;) that
 said slave was not in the company of any white person, had no ticket
 to use said gun, nor was he employed as a watchman, or to hunt or
 kill game within his master's plantation; and deponent claims
 forfeiture of said weapon, according to act in such cases made and
 provided.

Sworn to before me this _____ day of

A. D.

C. D.

Magistrate.

Signed,

A. B.

3d. Certificate of Forfeiture.

STATE OF SOUTH-CAROLINA, }
 District. }

Whereas A. D. hath made oath before me, according to law, that
 he did on the _____ day of _____, seize and take from D., slave of
 C. D., a (here describe the weapon) who was using and carrying the
 same contrary to law. And whereas, ten days notice has been given
 to the said C. D., to shew cause, (if any,) why the same should not
 be condemned as forfeited, and no satisfactory cause has been shewn.
 Now, therefore, I, E. F., magistrate, hereby certify and declare the
 said weapon to be forfeited and lawfully condemned, to be sold within
 ten days. Given under my hand and seal this _____ day of
 A. D., 18

E. F. [L. s.]

Magistrate.

A R R E S T .

1st. WHAT IS AN ARREST.

2nd. WHO MAY OR MAY NOT BE ARRESTED.

3d. FOR WHAT CAUSES OF SUSPICION AN ARREST MAY BE.

4th. BY WHOM AN ARREST SHALL BE MADE.

5th. THE MANNER OF AN ARREST.

6th. WHAT IS TO BE DONE AFTER THE ARREST.

1st. *What is an Arrest.*

An *arrest* signifies the restraint of a man's person, depriving him of his own free will and liberty, and binding him to become obedient to the law; and it may be called the beginning of imprisonment. Lamb. 93.

2d. *Who may or may not be Arrested.*

No person shall be freed from arrests for treason, felony or breach of the peace. 4 Inst. 24, 25.

The Senators and Representatives of the United States shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest, during their attendance at the session of their respective houses, and in going to and returning from the same. Const. of the U. S., Sec. 6, Art. 1. Privileged persons.

The privileges of the members of both Houses shall not be extended so as to protect any member who shall be charged with treason, felony, or breach of the peace. Const. of S. C., Sec. 14. Art. 1.

No civil officer shall execute any process (unless for treason, felony, or breach of the peace) on any person, at any muster, or other time when such person shall be obliged to bear arms, nor in going to or returning from any muster or place of rendezvous, or within twenty-four hours after such person shall be discharged from appearing in the regiment, company or troop, to which he shall belong, under the penalty of £5, and the service of such process shall be void. Militia Act, 10th May, 1794. At muster.

In cases of corporations, the process is by a *distringas*, for they cannot be arrested. 3 Salk. 46.

A warrant executed against any person whatsoever on the Lord's Day, is void, and the persons serving the same shall suffer damages as if they had done the same without warrant; except in cases of treason, felony or breach of the peace. A. A., No. 329. On Lord's Day.

3d. For what causes of suspicion an arrest may be.

By the statute of 34 Ed. 3, c. 1., power is given to the justices of the peace, to arrest all those whom they find by indictment, or by suspicion, and to put them in prison. *And the causes of suspicion*, which are generally agreed to justify the arrest of an innocent person for felony, are as follow :

Common
fame.

The common fame of the country, though it seems that it ought to appear upon evidence, in an action brought for such arrest, that such fame had some probable ground. 2 Hawk. 76.

Circum-
stances.

The being found in such circumstances as induce a strong presumption of guilt, as coming out of a house wherein murder hath been committed, with a bloody knife in one's hand; or being found in possession of any part of goods stolen, without being able to give a probable account of coming honestly by them. 2 Haw. 76.

Behaviour.

The behaving one's self in such a manner as betrays a consciousness of guilt, as where a man accused of felony, on hearing that a warrant is taken out against him, doth abscond. 2 Haw. 76.

But the party who flies from an arrest for a capital offence, is not thereby guilty of a capital offence. 2 Haw. 122.

Bad
Company.

The being found in company with one known to be an offender at the time of the offence, or generally at other times keeping company with persons of scandalous reputation. 2 Haw. 76. 2 Inst. 52.

Idling.

The living an idle, vagrant, and disorderly life, without having any visible means to support it. 2 Hawk. 76.

The being pursued by hue and cry. 2 Hawk. 76.

For if a felony is done, and one is pursued upon hue and cry, that is not of ill fame, suspicious, unknown nor indicted, he may be attached and imprisoned by the law of the land. 2 Inst. 52.

But generally no such cause of suspicion as any of the abovementioned will justify an arrest, where in truth no such crime hath been committed, unless it be in the case of hue and cry. 2 Haw, 76.

4th. By whom the arrest shall be made.

Officers.

In criminal cases, a person may be apprehended and restrained of his liberty, and not only by process out of some court, or warrant from a magistrate, but frequently by a constable, watchman, or private person, without any warrant or precept.

Private
person.

Thus, all persons who are present when a felony is committed, or a dangerous wound given, are bound to apprehend the offender, on pain of being fined and imprisoned for their neglect. 2 Haw. 74.

Also, every private person is bound to assist an officer demanding

his help, for the taking of a felon, or the suppressing of an affray. 2 Haw. 75.

Also, a watchman may arrest a night walker, without any warrant from a magistrate. 2 Inst. 52.

In like manner, a constable may *ex officio*, arrest a breaker of the peace in his view, and keep him in his house, or in the stocks, till he can bring him before a justice. 1 H. H., 587.

Or any person whatsoever, if any affray be made to the breach of the peace, may without any warrant from a magistrate, restrain any of the offenders, to the end the peace may be kept; but after the affray is ended, they cannot be arrested without an express warrant. 2 Inst. 52.

So much concerning an arrest without a warrant; next follows, arresting with such warrant.

The warrant is ordinarily directed to the sheriff or constable, and they are indictable and subject thereupon to a fine and imprisonment, if they neglect or refuse it. 1 H. H., 581. Officer compelled.

If it be directed to the sheriff, he may command his under sheriff, or other sworn or known officer, to serve it, without writing any precept; but if he will command another man, that is no such officer, to serve it, he must give him a written precept, otherwise false imprisonment will lie. Lamb., 89. By deputy.

But every other person to whom it is directed, must personally execute it; yet it seems that any one may lawfully assist him. 2 Haw., 86.

If a warrant be generally directed to all constables, no one can execute it out of his own precinct; for in such case it shall be taken respectively to each of them within their several districts, and not to one of them to execute it within the district of another; but if it be directed to a particular constable, (Mr. Hawkins says to a particular constable by name,) he may execute it any where within the jurisdiction of the justice, but is not compellable to execute it out of his own constablewick. Lord Raym., 546. 1 H. H., 581. 2 H. H., 110. 2 Haw., 86.

The justice that issues the warrant may direct it to a private person if he pleaseth, and it is good; but he is not compellable to execute it, unless he be a proper officer. 1 H. H., 581. Private person not compelled.

But by the justice's oath, the warrant ought not to be directed to the party, but to some indifferent person, to execute it.

If a warrant is directed to two or more jointly, yet any one of them alone may execute it. Dalt., c. 169.

By City
Guard.

The City Guard of Charleston have the right to arrest persons committing affrays or breaches of the peace, without any warrant. *City Council vs. Payne*, 2 N. & Mc., 475.

Felons from
another
State.

Private persons, without a warrant, may arrest in this State a party who has committed a felony in another State, and *prima facie* evidence of the fact, as the proclamation of the governor's, or proof of true bill found, is sufficient to warrant the arrest. *State vs. Andrews*, 1 Hill, 327.

5th. *The manner of an Arrest.*

With speed.

The officer to whom a warrant is directed and delivered, ought, with all speed and secresy, to find out the party, and then to execute the warrant. *Dalt. c. 169.*

It is certainly an offence of a very high nature to oppose one who lawfully endeavors to arrest another for treason or felony: and it seems that the person who so opposes an arrest for treason, whereof he knows the party to have been guilty, is thereby guilty of the treason; and that he who so opposes an arrest for felony, is an accessory to the felony. *2 Haw. 121.*

Night.

An arrest in the night is good, both at the suit of the State, and of the subject; else the party may escape. *9 Co. 66.*

In a different
district.

Constables and others may, on having the warrant endorsed by a justice in another district or county, into which an offender shall have escaped, arrest an offender in such other district or county, and carry him before the justice who endorsed the warrant, or some other justice or justices of such other district or county, if the offence is bailable, to find bail; or else shall carry him back again before a justice in the district or county from whence the warrant did first issue.

Posse
Comitatus.

Any justice, or the sheriff, may take of the district or county any number that he shall think meet, to pursue, arrest and imprison traitors, murderers, robbers and other felons; or such as do break, or go about to break or disturb the peace; and every man being required, ought to assist and aid them, on pain of fine and imprisonment. *Dalt. c. 171.*

But it is not justifiable for a justice, sheriff, or other officer to assemble the *posse comitatus*, or raise a power or assembly of people, upon their own heads, without just cause. *Dalt., c. 171.*

And in such case it is referred to the discretion of the justice, sheriff or other officer, what number they will have to attend on them, and how, and after what manner they shall be armed, or otherwise furnished. *Dalt., c. 171*

As to the case of breaking open doors, in order to apprehend offenders, it is to be observed, that the law doth never allow of such extremities, but in case of necessity; and therefore, that no one can justify the breaking open another's door, to make an arrest, unless he first signify to those in the house the cause of his coming, and request them to give him admittance. 2 Haw. 86. ^{Breaking doors.}

But where a person authorized to arrest another, who is sheltered in a house, is denied quietly to enter into it, in order to take him, it seems generally to be agreed, that he may justify the breaking open the doors, in the following instances :

Upon a warrant grounded on an indictment for any crime whatsoever, or upon a warrant from the General Court of Sessions, to compel a man to find sureties for the peace or good behaviour. ^{Upon warrant.}

Where one is known to have committed a treason or felony, or to have given another a dangerous wound, is pursued either with or without a warrant, by a constable or private person, and upon a warrant, for probable cause of suspicion of felony, the person to whom such warrant is directed, may break open doors to take the person suspected, if upon demand he will not surrender himself, as well as if there had been an express and positive charge against him. ^{On pursuit.}

And as he may break open such person's own house, so much more may he break open the house of another to take him; for so the sheriff may do upon a civil process: but then he must, at his peril, see that the felon be there; for if the felon be not there, he is a trespasser to the stranger whose house it is. 2 H. H., 117.

But it seems that he that arrests as a private man barely upon suspicion of felony, cannot justify the breaking open of doors to arrest the party suspected, but he doth it at his peril; that is, if in truth he be a felon, then it is justifiable; but if he be innocent, but upon a reasonable cause suspected, it is not justifiable. 1 H. H., 82.

But a constable in such case may justify, and the reason of the difference is this; because, that in the former case, it is but a thing permitted to private persons to arrest for suspicion, and they are not punishable if they omit it, and therefore they cannot break open doors; but in case of a constable, he is punishable if he omit it upon complaint. 2 H. H., 92.

Upon a warrant from a justice of the peace, to find sureties for the peace or good behavior. 2 Haw., 86. 1 H. H., 582. 2 H. H., 117.

And in general, Mr. Dalton says, an officer upon any warrant from a justice, either for the peace or good behavior, or in any case where the State is party, may by force break open a man's house to arrest the offender. Dalt., c. 169.

- On search.** On a warrant to search for stolen goods, the doors may be broken open, if the goods are there; and if they are not there, the constable seems indemnified; but he that made the suggestion, is punishable. 2 H. H., 151.
- Levying forfeiture.** On the warrant of a justice of the peace for the levying of a forfeiture, in execution of a judgment, or conviction for it, grounded on any Act of Assembly, which gives the whole or any part of such forfeiture to the State. 2 Haw., 86.
- On affray.** Where an affray is made in a house, in the view or hearing of the constable, he may break open the doors to take them. 1 Haw., 137. 2 Haw., 87.
- Disorderly house.** If there be disorderly drinking or noise in a house, at any unreasonable time of night, especially in inns, taverns, or ale-houses, the constable, or his watch, demanding entrance, and being refused, may break open the doors to see and suppress the disorder. 2 H. H., 95.
- Escape.** Wherever a person is lawfully arrested for any cause, and afterwards escapes, and shelters himself in a house. 2 Haw., 87.
- Not on general warrant.** But upon a general warrant, without expressing any felony or treason, or surety of the peace, the officer cannot break open a door. 1 H. H., 584.
- Not in civil case.** In a civil suit, the officer cannot justify the breaking open an outward door or window, in order to execute process; if he doth, he is a trespasser: but if he findeth the outward door open and entereth that way; or if the door be open to him from within, and he entereth, he may break open the inward doors, if he findeth that necessary, in order to execute his process. Fost., 319.
- For a man's house is his castle, for safety and repose to himself and family; but if a stranger, who is not of the family, upon a pursuit, taketh refuge in the house of another, this rule doth not extend to him, it is not his castle, he cannot claim the benefit of sanctuary therein. Fost., 320.
- And it is always to be remembered that this rule must be confined to the case of arrest upon process in civil suits only; for where a felony hath been committed, or a dangerous wound given, or even where a minister of justice cometh armed with process founded on a breach of the peace, the party's house is no sanctuary for him: in these cases, the justice which is due to the public, must supersede every pretence of private inconvenience. Ib.
- After entry.** Finally, in all these cases, if an officer, to serve any warrant, enters into a house, the doors being open, and then the doors are locked upon him, he may break them open in order to regain his liberty. 2 Haw., 87.

If there be a warrant against a person, for a trespass or breach of the peace, and he flies and will not yield to the arrest, or being taken makes his escape, if the officer kill him, it is murder. 2 H. H., 117. When an officer kills.

But if such person, either upon the attempt to arrest, or after the arrest, assault the officer, to the intent to make his escape from him, and the officer standing upon his guard kills him, this is no felony; for he is not bound to go back to the wall, as in common cases of *se defendo*, for the law is his protection. 2 H. H., 118.

But where a warrant issueth against a person for felony, and either before arrest, or after, he flies and defends himself with stones or weapons, so that the officer must give over his pursuit or otherwise cannot take him, without killing him, if he kill him it is no felony: and the same law is, for a constable that doth it by virtue of his office, or on hue and cry. 2 H. H., 118.

But then there must be these cautions: (1.) He must be a lawful officer, or there must be a lawful warrant. (2.) The party ought to have notice of the reason of the pursuit, namely, because a warrant is against him. (3.) It must be a case of necessity, and that no such a necessity as in the former case, where an assault is made upon the officer; but this is the necessity, namely, that he cannot otherwise be taken. 2 H. H., 119.

But though a private person may arrest a felon, and if he fly so as he cannot be taken without he be killed, it is excusable in this case for the necessity; yet it is at his peril that the party be a felon; for if he be innocent of the felony, the killing (at least before the arrest) seems at least manslaughter; for an innocent person is not bound to take notice of a private person's suspicion. 2 H. H., 119.

A person sworn and commonly known, and acting within his own precinct, need not show his warrant; but he ought to acquaint the party with the substance of it. 2 Haw., 85.

But if he acts out of his precinct, or it is not sworn and commonly known, he must show his warrant if demanded. 2 Haw., 85, 86. When bound to show warrant. Otherwise the party may make resistance, and needs not to obey it. Dalt., c. 169.

But if the constable has no warrant, but doth it by virtue of his office, as a constable, it is sufficient to notify that he is a constable, or that he arrests in the State's name. 1 H. H., 583.

If the constable come unto the party, and require him to go before the justice, this is no arrest or imprisonment. Dalt., c. 170.

For bare words will not make an arrest, without laying hold on the person, or otherwise confining him; but if an officer comes into a

room, and tells the party he arrests him, and locks the door, this is an arrest; for he is in custody of the officer. Salk., 79. 2 Haw., 129. Cases in the time of Lord Hardwicke, 301.

Second
arrest.

It hath been holden, that if a constable, after he hath arrested the party by force of a warrant, suffer him to go at large, upon his promise to come again and find sureties, he cannot afterwards arrest him by force of the same warrant; however, if the party return, and put himself again under the custody of the constable, it seems that it may be probably argued, that the constable may lawfully detain him, and bring him before the justice, in pursuance of such warrant; but in this the law doth not seem to be clearly settled. 2 Haw., 81.

But if the party arrested do escape, the officer upon fresh suit may take him again and again, so often as he escapeth, although he were out of view, or that he shall fly into another town or county, or district. Dalt., c. 169.

6th. What is to be done after the Arrest.

Brought
before justice

When a private person hath arrested a felon, or one suspected of felony, he may, with as much speed as he conveniently can, deliver him to a constable, to carry to a justice of the peace, or he may carry him there himself. 1 H. H., 589.

Imprisoned.

If the constable, or his watch, hath arrested affrayers, or persons drinking in an ale-house, disorderly, at an unseasonable time of night, he may put the persons in the stocks, or in a prison, if there be one in the place, till the heat of their passion or intemperance is over, though he deliver them afterwards, or till he can bring them before a justice. 2 H. H., 95.

Direction of
warrant.

If the arrest is by virtue of a warrant, when the officer hath made the arrest, he is forthwith to bring the party, according to the direction of the warrant: if it be to bring the party before the justice who granted the warrant specially, then the officer is bound to bring him before the same justice; but if the warrant be to bring him before any justice of the county or district, then it is in the election of the officer to bring him before what justice he thinks fit, and not in the election of the prisoner. 1 H. H., 582. 2 H. H., 112.

Detained if
in the night.

But if the time be unseasonable, as in or near the night, whereby he cannot attend the justice, or if there be danger of a present rescue, or if the party be sick, he may secure him in the stocks, or in an house, till the next day, or such time as it may be reasonable to bring him. 2 H. H., 120.

And when he hath brought him to the justice, yet he is in law still

in his custody; till the justice discharge, or bail, or commit him. 2 H. H., 120.

But it is said, the constable is not obliged to return the warrant ^{May keep warrant} itself, but may keep it for his own justification, in case he should be questioned for what he had done; but only to return what he has done upon it. Lord Raym., 1196.

ARSON.

1st. *What is.*

Arson, at common law, is the malicious and voluntary burning the house of another, by night or by day. By the term house, is meant not only the dwelling, but all out-houses, which are parcel thereof, though not adjoining thereto, or under the same roof. A house to be a parcel of the dwelling-house, must be somehow connected or contributing to it, such as a kitchen, smoke-house, or such other as is usually considered as a necessary appendage of a dwelling-house. Definition.

It cannot embrace a store, blacksmith's shop, or any other building separated from it, and appropriated to another and distinct use, unless such store is under the same roof, or some of the family sleep in it. State vs. Gians, 1 N. & Mc., 583.

2d. *Of the Burning.*

The burning necessary to constitute arson must be an actual burning of the whole or some part of the house. Neither a bare intention, nor even an actual attempt to burn a house, by putting fire into it, ^{Actual burning.} will amount to the offence if no part of it be burned; but it is not necessary that any part of the house should be wholly consumed, or that the fire should have any continuance, and the offence will be complete, though the fire be put out, or go out of itself. Russell on Crimes, 2, 486.

3d. *The burning must be wilful and malicious, otherwise it is only a trespass.*

No negligence or mischance will amount to such burning. But the wilful or malicious burning need not correspond to precise intent of the party. If A. have a malicious intent to burn the house of B., and in setting fire to it, burn the house of C., though the house of B. escape, this will be held in law to be the wilful and malicious burning of the house of C. And such malicious and wilful burning of the

house of another, may be by the means of setting fire to the party's own house, and this, though it should appear that the primary intention of the party was only to burn his own house.

4th. It must be the house of another.

And the burning a party's own house, if no other be burned thereby, is not arson, but if near to other houses, or in a crowded city, it is a great misdemeanor. But if the house be that of another, and the party have a mere possession, without an interest therein, the burning such house is arson. Russ., 2, 488.

5th. Punishment.

The punishment of arson is death, without benefit of clergy, wherefore a magistrate may not admit to bail, the party charged therewith.

ASSAULT AND BATTERY.

1st. What is an Assault.

An assault is an attempt or offer with force and violence to do a corporal hurt to another, as by striking at another, holding up the fist in a threatening manner within striking distance, throwing at with intent to strike, presenting a gun within shooting distance, or any other similar act. No words whatsoever, be they ever so provoking, will amount to an assault. And the words used at the time may so explain the intention of the party as to qualify his act and prevent it from being deemed an assault, as where A. laid his hand upon his sword and said, "If it were not assize time I would not take such language from you." It was holden not to be an assault, on the ground that he did not design to do the other party any corporal hurt at that time. Any offer or attempt to do violence to the person of another, in a rude, angry, or resentful manner, is an assault. Therefore, where a party had a negro in custody, and tied to his person by a rope, and another cut the rope and carry off the negro, it was held to be an assault. State vs. Davis & Pardee, 1 Hill, 46.

The taking indecent liberties with a female, without her consent, though she do not resist, is an assault; so also, the exposing another to the inclemency of the weather. Russell on Crimes, 1, 605.

2d. What is a Battery.

A battery is more than an attempt to do a corporal hurt to another,

but any injury whatsoever, be it ever so small, being actually done to the person of a man in an angry, revengeful, rude, or insolent manner, such as spitting in his face, or any touching him in anger, or violently jostling him out of the way, is a battery. For every man's person is sacred, and the law prohibits any meddling therewith in the slightest manner. Russell 1, 605.

The injury need not be effected directly by the hand of the party. Thus, there may be an assault by encouraging a dog to bite, by riding ^{Setting on a dog.} over a person with a horse, or by wilfully or violently driving a cart against the carriage of another, thereby causing bodily injury to the persons travelling in it.

And one who incites others to commit an assault and battery, is ^{Inciting another.} himself guilty of the offence, if it be committed. State vs. Lymburn, 2 Bre. R., 397.

Neither is it necessary that the assault should be immediate, as where a defendant throw a lighted squib into a market place, which ^{Throwing a squib.} being tossed from hand to hand, at last hit the plaintiff in the face, and put out his eye—this was adjudged an assault and battery. Whether an act shall amount to a battery, must, in every case, be collected from the intention. Thus, if one person lay hands on another to prevent a breach of the peace, or to separate him from another ^{Intention.} with whom he is fighting, it is not a battery; or, if two consent to play at cudgels and one happen to hurt the other, it would not amount to a battery.

3d. In what cases Assault and Battery may be justified.

No words will justify an assault, nor will an assault, or even a blow, ^{Words not.} justify an enormous battery. State vs. Wood, 1 Bay, 351, and State vs. Quin, 2 Tr. Con., 694. Yet, if the defence be proportionate to ^{Self-defence.} the aggression, a party may justify in defence of his person, wife, servant, master, parent or child.

A man may use force to put another out of his house, if he remain ^{Entry of house.} after being desired to leave. Yet, he must use only such force as is necessary to put him out, and he may not inflict a violent battery. State vs. Lazarus, 1 M'C., 34.

In any trespass or breach of a close, without violence, a party ^{Request to depart.} cannot justify an assault without a request to depart; but if the entry be with violence, it may be opposed at once, with violence. Green v. Goddard, 2 Salk, 641.

4th. Punishment.

The party injured may recover damages for an assault and battery, ^{Damages.}

Prosecution. in a civil action, which must be brought within twelve months, and pursue the defendant in a prosecution at the suit of the State. In the latter case, the punishment of a white person is by fine and imprisonment, and of a slave, by imprisonment, whipping, or confinement in the tread mill.

Forfeiture. By the Act of Ann, c. 14, 2d S. L. 569, if the assault and battery be for money won at gaming, the party convicted thereof shall forfeit all his goods, chattels, and personal estate, and be imprisoned for the term of two years.

5th. Requisite of Affidavit, form of Warrant, &c.

The affidavit should state concisely the time, place and manner of the assault and battery, the christian and surnames of the parties. Must shew that it was done without sufficient cause or provocation, and if the assault and battery be aggravated, the particulars there should be stated, otherwise the party might be admitted to light be

Form of Warrant.

STATE OF SOUTH-CAROLINA, }
District. }

By A. B., magistrate, in and for the said State. To any lawful constable.

Whereas complaint on oath has been made to me by B. C., that C. D. did on the _____ day of _____ at _____, in the district and State aforesaid, without just cause or provocation, assault and strike him (or, if violent, did violently beat him;) these are, therefore, to command you forthwith to apprehend the said C. D., and bring him before me, to be dealt with according to law.

Given under my hand and seal, this _____ day of _____

A. D.

A. B. [L. s.]
Magistrate.

ASSEMBLIES.

1st. RELIGIOUS ASSEMBLIES.

2d. UNLAWFUL ASSEMBLIES.

1st. Of Religious Assemblies.

A religious assembly is a congregation of persons of any sect, creed or persuasion, whatsoever, for the worship of Almighty God; and suc

assemblies are under the protection of the law. The offences which may be committed against such, are first, the disturbance of the same during worship, which is an indictable offence, and punishable by fine and imprisonment. Bell ads. Graham, 1 N. & Mc., 278. Disturbance of, indictable

Secondly. The retailing of spirituous liquors within one mile of any place, set apart for religious worship, during the time of worship at such place; for which offence, the party guilty thereof, is liable to indictment, and upon conviction, to a penalty of fifty dollars. Act of 1809, 5th S. L., 569. Retailing near.

The assembling of slaves in the day time, for religious worship, is not contrary to law, if a white person be present; and the disturbing such an assembly, is an indictable offence; nor have persons invested with the authority of a patrol, the right to disperse them; but to warrant such an assembly in the night time, there must be a majority of white persons present, and it must not be extended beyond nine o'clock. Act of 1803, and Bell ads. Graham, 1 N. & Mc., 278. Of slaves.

2d. Unlawful Assemblies.

1st. *White Persons*.—An unlawful assembly generally, is the meeting of three or more persons to do an unlawful act, (as the pulling down an enclosure) and part without doing it or making any motion towards it. An assembly of a man's friends, for the defence of his person, against those who threaten to beat him if he go to such a place, &c., is unlawful, for he should provide for his safety by demanding sureties of the peace from those who threaten him, and not make use of such violent methods, which must be attended with danger of tumults and disorders to the disturbance of the public peace. But an assembly of a man's friends, in his own house, for the defence of the possession of it against those who threaten to make an unlawful entry, or for the defence of his person against such as threaten to beat him in his own house, is indulged by law; for a man's house is looked upon as his castle. He is not, however, to arm himself, and assemble his friends in defence of his close; 1st Russell, 255. The punishment of an unlawful assembly is by fine and imprisonment. Meeting for unlawful act.
Of man's friends.
Not if in his own house.

2nd. *Of Slaves*.—All assemblies and congregations of slaves, free negroes, mulattoes and mestizoes, whether composed of all or any of the above description of persons, or of all or any of the above described persons, and a proportion of white persons, assembled or met together for the purpose of mental instruction, in a confined or secret place of meeting, barred, bolted or locked, so as to prevent the free ingress and egress to and from the same, shall be, and the same is hereby declared to be an

unlawful meeting; and the magistrates, sheriffs, militia officers, and officers of the patrol, being commissioned, are hereby directed, required, and empowered to enter into such confined places, where such unlawful assemblies are convened, and, for that purpose, to break doors, gates, or windows, if resisted, and disperse such slaves, negroes, mulattoes, or mestizoes, as may be then and there found unlawfully met together and convened; and such magistrates, sheriffs, constables, militia officers, and officers of the patrol, are hereby empowered and required to call unto their assistance, such force and assistance from the neighborhood, as he or they may judge necessary for the dispersing of such unlawful assemblage of persons of color as aforesaid; and the officers and persons so dispersing such unlawful assemblage of persons, shall, if they think proper, impose such corporal punishment, not exceeding twenty lashes, upon such free negroes, mulattoes, slaves, and mestizoes, as they may judge necessary for deterring them from the like unlawful assemblage in future; and the officers dispersing such unlawful assemblies, shall have power to take into custody, and deliver to the nearest constable, all or any of such slave or slaves, free negroes or mulattoes, as may be found transgressing this law; and the said constable is hereby required to receive such persons, and convey them to the nearest magistrate, who shall inflict such punishment, not exceeding twenty lashes, which any such magistrate may order and direct.

Persons entering and dispersing such meetings, to be under the protection of the law.

Every officer or other person, so entering into and dispersing such slaves, free negroes, mulattoes and mestizoes, from such closed or confined places of meeting, or from any open meeting, after nine o'clock in the evening, shall be, and he is declared under the protection of the law, and free from all suits at law, prosecutions and indictments, for or on account of such acts as may be done and performed by him or them, in pursuance of the letter and meaning of this act; and all and every person or persons, suing or prosecuting any officer for any trespass or tort done by him in putting in force and executing this law, on failure of convicting the party, or proving the case fully, so as to entitle him, her, or them, to recovery of damages, shall be liable and be deemed and adjudged to pay to the party so prosecuted or sued, treble costs; for which costs, the party prosecuted or sued, shall have his execution in the usual form, against such prosecutor or informer, as plaintiff in the cause, upon application to the Clerk of the Court, where the cause has been tried.

It shall be lawful for any person or persons, who may be engaged in dispersing any unlawful assemblage of slaves, free negroes, mulat-

toes or mestizoes, to enter into all such places, as the said persons ^{May break open doors.} may be assembled at, and if resisted, they may break open doors, windows or gates. Act 1839, 69, 60 and 51.

ATTACHMENT FOR DEBT.

Attachment for debt is a process against the goods and chattels of a debtor, granted on the oath of a party, and on his or her agent giving bond with surety in double the sum to be attached. It lies first, in Foreign, where the applicant makes oath that the debtor is absent from and without the limits of this State. Secondly, Domestic, where the oath is, that the debtor absconds or conceals himself, so that the ordinary process of the law cannot be served upon him, or is removing out of the district privately, or intends to remove his effects.

- 1st. OF THE BOND, AND THE LIABILITY OF THE PLAINTIFF AND HIS SURETY.
- 2d. OF THE AFFIDAVIT.
- 3d. OF THE JURISDICTION IN FOREIGN AND DOMESTIC ATTACHMENT.
- 4th. OF WHAT IS LIABLE TO ATTACHMENT, AND THE LIEN THEREBY CREATED.
- 5th. OF THE GARNISHEE.
- 6th. OF PROCEEDINGS AFTER ATTACHMENT.
- 7th. PRECEDENTS.

1st. *Of the Bond, and Liability of the Plaintiff and Surety.*

Before granting an attachment, every magistrate shall take bond, with surety of the plaintiff or his agent, in double the sum to be attached, payable to the defendant, conditioned for the satisfying and paying all costs which may be awarded to said defendant, in case the plaintiff therein shall discontinue or fail in his suit, as also all damages which may be recovered against the plaintiff for his suing out the same, which bond shall be returned to the Court to which the attachment is returnable—and in case of foreign attachment, the defendant is entitled, within two years, to appear before any magistrate of the district where the attachment was issued, who shall give notice to the plaintiff or his surety, and shall, upon hearing the case, determine the matter as to justice shall appertain, notwithstanding any previous

Double the
sum.
Condition.

judgement in the absence of the defendant, from which either party may appeal, as in other cases.

2nd. Of the Affidavit.

Not in the
alternative.

It is not necessary that the affidavit should be in writing, but it should be recited in the writ of attachment, and should not be in the alternative, but must state positively the debt due, and the distinct ground on which an attachment is demanded; and an affidavit that "the defendant is about to remove from without the limits of the State or so absconds and conceals himself that the ordinary process of the law cannot be served upon him," is insufficient, as the affidavit should state positively the one or the other. *Hagood vs. Hunter*, 1 Mc., 571

3d. Of the Jurisdiction in Foreign and Domestic Attachment.

1st. Foreign.

The jurisdiction of a magistrate in foreign attachment is limited to twenty dollars; except in the town of Hamburg, under the Act of 1846 a party is not subject to such process, if ten days before leaving the State, he give notice of his intention to leave, by a written notice put up at the Court-house of the district, and at the muster ground of the Beat in which he resides. Act 1839, p. 18.

2d. Domestic.

But the jurisdiction of a magistrate, in domestic attachment, is unlimited. Where the demand does not exceed the sum of twenty dollars, the attachment is directed to a constable, and is returnable to a magistrate. If it exceed that sum, but do not exceed the sum of eighty-five dollars and seventy-five cents, it may be directed either to a constable or the sheriff of the district, and is returnable to the next Court of Common Pleas, for the district where the same may be issued. If it exceed the last mentioned sum, it shall be directed to the sheriff. Act 1839, p. 18.

4th. What is liable to Attachment, and the lien thereby created.

Goods,
chattels, &c.

By the terms of the Act of 1839, the goods and chattels of the debtor are liable to attachment, also all debts in the hands of any person indebted to the absent debtor, and it seems that goods and chattels are liable, in which he may have but a part interest, either as partner, or joint owner with another. *Schatzel vs. Boltin*, 3 Mc., 33.

Land not.

But an attachment from a magistrate cannot be levied upon land. As to the debts due to the absent debtor, a lien can only be created on them by actual notice to the parties indebted, and the mere attaching books of account, will not create a lien upon the debts; and if the debt

be by negotiable note, the maker thereof cannot be made a garnishee by reason of money due on such note. *Gaffney vs. Bradford*, 2 Bail., 441.

The attachment first levied is entitled to priority in regard to the effects attached. *Robertson & Son vs. Forrest*, 2 Bre., 466; and nothing will destroy the lien, except a dissolution by special bail. It takes precedence of a junior judgement. *Goore & Danavant vs. McDaniel*, 1 Mc., 480; and a judgement creditor of an absent debtor cannot set aside the attachment for irregularity. *Kincaid vs. Neall*, 3 Mc., 201.

5th. Of the Garnishee.

The garnishee is a third party, upon whom a copy of the attachment is served with notice to appear at the Court to which the same is returnable, and make answer on oath what he may be indebted to the party against whom the attachment is issued, or what effects of said party he may have in his possession at the time of service upon him. If the garnishee makes default, or appears and acknowledges debts due by him, or effects of the absent debtor in his hands, then judgement may be entered against him, and execution issued for such amount as may be due by him, for such effects of the absent debtor as are in his hands, or so much thereof as may be sufficient to satisfy the judgement and costs of the plaintiff in attachment, unless the said garnishee shall surrender the said effects, to be disposed of as when the same shall be levied in attachment, or claim as creditor in possession, in which case, if his claim be established, he shall have a lien on the effects in his hands to the extent of his demand. Act 1839, page 19.

If the garnishee return that he is not indebted to the absent debtor, and has none of his effects in his hands, such return may be falsified; and on proof that he is indebted, or hath effects, judgement may be entered against him, as in case such effects were admitted in his return. *Westmoreland vs. Tippins*, 514.

6th. Of Proceedings after Attachment.

If an attachment, returnable to a magistrate, be returned as executed, the defendant may appear, and may replevy the goods attached, by giving bond with good surety to the magistrate to abide and perform the order therein made; but if the goods be not replevied, the subsequent proceedings shall be the same as an original process against the body of the defendant, where there is default of appear-

LAW OF MAGISTRATES.

Goods sold. ance, and all goods and effects so attached, and not replevied, may, by order of the magistrate, be sold towards the satisfaction of the plaintiff's judgement, as if the same had been taken by execution.

7th. *Precedents.*

THE STATE OF SOUTH-CAROLINA, }
District. }

Domestic
Attachment
Bond.

Know all men by these presents, That we are held and firmly bound to (*The party against whom the attachment is issued,*) in the penal sum of (*twice the sum for which attachment issues,*) to be paid to the said his certain attorney, executors and administrators, firmly by these presents. Sealed with our seals, and dated at the day of in the year of our Lord one thousand eight hundred and

Whereas the above bound hath this day sued out a writ of attachment against the said before one of the justices of the district, &c.

Now the condition of this obligation is such, that if the said shall satisfy and pay unto the said all costs that shall be awarded the said in case the said shall discontinue, or be cast in the said suit, and also all damages which shall be recovered against the said for suing out such attachment; then this obligation to be void and of none effect, or else to remain in full force and virtue.

A. B., [L. s.]
Magistrate, [L. s.]

STATE OF SOUTH-CAROLINA, }
District. }

Attachment
writ under
\$30.

Personally appeared who made oath that is justly indebted to in the sum of and that the said is absent from the State, or so conceals himself, that the ordinary process of law cannot be served upon him.

Sworn this 18 before me.

To any lawful Constable, to wit:

Complaint upon oath being made to me, by that is indebted to in the sum of and that he is now absent from the State, or so conceals himself that the ordinary process of law cannot be served upon him: you are there-

65

Given under my hand and seal, at _____ the _____ day
of _____ 18____

A. B. [L. s.]
Magistrate.

THE STATE OF SOUTH-CAROLINA. }
District. }

Whereas, has this day appeared before me, and upon oath, hath complained, and sworn, that is justly indebted to him in the sum of dollars, on by the said to the said and that the said is privately removing out of the said district of or absconds and conceals himself, so that the ordinary process of law cannot be served upon him:

Therefore you, and each of you, are hereby commanded to attach the slaves, goods, and chattels, of the said _____ or so much thereof as shall be of value sufficient to satisfy the said debt, and the costs of this process, wheresoever the same shall be found, or in the hands of any person or persons indebted to, or having any effects of the said _____ so that you make the said _____ a party in court, at the court of Common Pleas to be holden at the court house in _____ in and for the district of _____ aforesaid, on the _____ day of _____ to answer to the said _____ of the complaint aforesaid.

And you are further commanded, that at the time of the service of this process, you do summon such person or persons as are indebted to, or have any of the effects of the said _____ to appear at the court aforesaid, to be holden as aforesaid, there to answer, upon oath, what he, or she, or they, is or are indebted to the said _____ and what effects of the said _____ he, she, or they, has or have in his, her, or their, hands. And that you return to the said court, to be holden as aforesaid, an account of your actings and doings herein, and this writ.

- Witness, Esq., one of the justices of the
of the said district, at the day of in
the year of our Lord one thousand eight hundred and and
in the year of the sovereignty and independence of the
United States of America. [L. s.]

ATTACHMENT FOR CONTEMPT.

Punishment of. A contempt is punishable by an attachment of the person and commitment to close confinement, to which a fine is sometimes added. The power of attachment for contempt is not confined to court record, but a magistrate may fine and commit for contempt of authority; and by the act of 1839, p. 18 and 19, any person who in a magistrates court offer an insult to the magistrate, or a holder sitting with him, or who shall make any undue disturbance the proceedings of a magistrate while sitting officially, is liable to be punished by said magistrate by a fine not exceeding twenty dollars and imprisonment not exceeding twelve hours. By the same act, 20, sec. 19, a magistrate may commit for one day to the jail of the district, any witness who shall refuse to give evidence without good cause shewn, and may fine him not exceeding ten dollars; and in the case of the State vs. Johnson, 1 Bre., 155, it was held, that the power of commitment for contempt is not confined to cases of court, but that he has that power for any contempt towards him while engaged in his official duties.

By witness.

ATTEMPT (TO COMMIT CRIME.)

A misdemeanor. An attempt to commit a felony is in many cases a misdemeanor and an attempt to commit even a misdemeanor has been decided in many cases to be itself a misdemeanor. And the mere solicitation of another to commit a felony is a sufficient act to constitute the misdemeanor. Thus, to solicit a servant to steal his master's goods, or to offer to bribe a judge, a juryman, or a voter, is a misdemeanor; an attempt to suborn a person to commit perjury, upon a reference to the judges, was unanimously held by them to be a misdemeanor. Procuring counterfeit silver coin, with intent to utter it, is a criminal offence, and clearly punishable as a misdemeanor, and the having a large quantity in possession will be held evidence of such procurement. 1 Russel, 44-47.

Provoking another to challenge. In the case of Comn vs. Tibbs, 1 Dana, 524, it was held, that while insinuating a desire to fight with deadly weapons, as they tend to provoke, such combat may amount to a misdemeanor at common law and in the case of Rex vs. Philips, 6 East., 464, the endeavouring

provoke another to send a challenge was held to be an indictable misdemeanor. 1 Russel, 275.

A party may be indicted for an attempt to commit a rape; and in the case of *State vs. Shepard*, 7 Comm. Rep., 54, it was held, that proof of a rape would sustain an indictment for an attempt, the latter offence being necessarily included in the former. Yet, in such cases, and in attempts to murder and so forth, the party may usually be indicted for an assault with intent to commit an offence.

ATTORNEY, AND POWER OF ATTORNEY.

An attorney is a person appointed by another to do any thing in his turn, place, or stead; and by the term, is most frequently meant attorney at law, but its use here is restricted to what is most frequently meant by the term agent.

1st. *How appointed.*

An attorney may be constituted either by parol or by deed, and one person may constitute another his agent or attorney in a certain line of business, by the recognition of former acts done by such attorney in such business; and the suffering a party to hold himself out as your attorney, without contradiction, will be regarded as a proof of appointment; but generally when the act to be done by the attorney requires a deed, the appointment of such must be by deed also. 1 Liv., 34-37.

2d. *Who may act as attorneys.*

A naked authority may be delegated to any person. Thus, married women, infants, aliens, &c., may be attorneys; 1 Liv., 32: and a master may constitute a slave his agent; *Chastain vs. Bowman*, 1 Hill, 270: and in regard to the ordinary transactions that are usually done by the wife, the law will presume the assent of the husband. But an authority, coupled with an interest and not collateral to it, cannot be executed by an infant or married woman. 1 Liv., 32.

3d. *Of the authority of attorney, and revocation.*

The authority of an attorney is either general or special, according to the nature of the appointment. If a person be a general agent, the principal is bound by his acts, provided they are within the general scope of his authority. But an agent constituted for a particular purpose, cannot bind the principal by any act in which he exceeds his authority; 1 Liv., 107: and delegated authority must be

pursued strictly, and an act done by an attorney should be done in the name of the principal. *Welsh vs. Parish, et al, 1 Hill, 1*. The authority of an attorney may be revoked by the marriage of principal, being a single woman, by the death of the principal, by express revocation, except when executed for valuable consideration, in which case it is irrevocable.

Revocation.

4th. Form of power of attorney.

Know all men by these presents, that _____
constituted, made and appointed, and by these presents do constitute and appoint _____ true and lawful attorney,
and in _____ name and stead, and to _____ use, to ask, demand, for, levy, recover and receive all such sum and sums of money, debts, rents, goods, wares, dues, accounts, and other demands whatsoever which are or shall be due, owing, payable, or belonging to _____ detained from _____ any manner of ways or means whatsoever: Giving and granting unto _____ said attorney by these presents, full and whole power, strength and authority and about the premises: to have, use, and take all lawful ways and means in _____ name for the recovery thereof; and upon the receipt of any such debts, dues, or sums of money aforesaid, acquittances, other sufficient discharges, for _____ and in _____ name, to make, receive, and deliver, and generally all and every other act and acts, thing and things, device or devices in the law whatsoever, needful and necessary to be done in and about the premises, for _____ and in _____ name to do, execute and perform, as fully, largely and amply, to all intents and purposes, as _____ might or could do, if _____ personally present if the matter required more special authority than this herein given, and attorneys one or more under _____ for the purpose aforesaid make and constitute, and again at pleasure to revoke: ratifying, allowing and holding, for firm and effectual, all and whatsoever _____ attorney shall lawfully do in and about the premises, by virtue hereof.
In witness whereof, _____ have hereunto set _____ hand and seal dated at _____ the _____ day of _____ in the year of our Lord thousand eight hundred and _____ and in the _____ year of our Sovereignty and Independence of the United States of America.

Sealed and delivered in the presence of _____

[L. S.]

Note.—If the power be to convey land, it must be witnessed by two witnesses, and if it is to be used in another State, then it should be sworn to by one of witnesses, and the official character and signature of the magistrate should be certified by the clerk of the court under the seal thereof, and the certificate of judge attached, that such person is the clerk of said court. 1 M. Con. Rep.,

AUCTIONS AND AUCTIONEER.

1st. Who can sell at Auction.

Any citizen of this State shall be at liberty to sell at auction, either his own or the property of another person, provided he secures to the State or city, as the case may be, the duties which are or may be imposed by law on sales at auction; but before he shall act in such capacity, he must give to the Council of the city or town, where he may reside, full and ample security for the due and faithful performance of his duty as auctioneer or vendue master, as the case may be. 6th S. L., 209.

2d. Liability of purchaser at Auction.

Every person who shall purchase any lands, slaves, houses, &c., at any public sale in this State, and which purchase shall be entered in the books of the vendue master so selling such property, and who shall refuse to comply with the conditions of the said sale, within seven days thereafter, shall be liable to all losses arising therefrom. And the auctioneer may resell such property on the original conditions; giving seven days notice of said sale, and recover from the non-complying purchaser, the expenses and commissions of the second sale, and the deficiency arising from such purchaser's non-compliance. 4th S. L. 672. Refusing to comply.

But this is to be understood of an actual and fair sale at auction; and a party would not be liable, as a purchaser, on a bid withdrawn before the hammer is down. Durn & East., 148,—and the employment of underbidders to puff at such sales, will vitiate them, and a purchaser would not be bound to comply. Bid withdrawn. Puffing.

B A I L.

1st. WHAT IS BAIL, AND THE POWER OF THE BAIL.

2d. WHEN A MAGISTRATE MAY BAIL, OR DISCHARGE WITHOUT BAIL:

3d. AMOUNT OF BAIL, AND REQUIRING EXCESSIVE BAIL.

4th. REFUSING OR GRANTING BAIL ILLEGALLY.

5th. OF BAIL BY HABEAS CORPUS.

6th. BY A JUDGE IN OPEN COURT, OR AT CHAMBERS.

1st. What is, and the power of the Bail.

Bail signifies the delivery of a man out of custody, upon the under-

taking of one or more persons for him, that he shall appear at a day limited to answer, and be justified by the law. The reason why it is called Bail, is, because the party restrained is thus delivered into the hands of those who bind themselves for his forthcoming, in order to a safe keeping or protection from prison. Burns' Justice.

The party thus delivered is regarded as in the custody of his bail, who has power at any time to arrest the said party, and surrender him to a magistrate in discharge of himself.

2d. When a Magistrate may Bail, or discharge without Bail.

1st. In Civil Cases.—Any magistrate is authorized and required to give, on proper affidavit, an order for reasonable bail, in any action, wherein bail be proper, but not of course, at the time of commencing, or during the pendency thereof, in any Court of Common Pleas, in the district where such magistrate resides, and may discharge the other duties and exercise the other honors of commissioners of special bail. Act 1839, p. 20, sec. 21.

Not in cases
not clergy-
able.

But may in
all others.

2d. In Criminal Cases.—By the Act of 1839, p. 14, sec. 6, no magistrate shall let to bail any person charged with any offence, the punishment of which is death, without benefit of clergy, but may admit to bail in all other cases; and if any person under lawful arrest, on a charge regularly made, and not bailable, be brought before a magistrate, he shall commit him to jail; but if the offence charged be bailable, the magistrate shall take recognizance with sufficient surety, if offered; in default thereof, such party shall be committed to prison, unless it clearly appear, upon examination, that the charge is not founded in probability, in which case, the party may be discharged.

3d. Of the amount of, and requiring excessive Bail.

Before the Act of 1839, the amount of bail was almost wholly within the discretion of the magistrates. But that Act, page 15, sec. 7, limits him, in a great measure, and establishes the following scale.

In cases
punishable
by fine.

1st. If the offence charged be punishable by fine and imprisonment, the amount of bail shall not be for less than two-hundred dollars, and if the fine be specified or limited, by statute, it shall not be for less than the greatest extent of such fine.

By corporal
punishment.

2d. If corporal punishment shall or may be imposed, it shall not be for less than three hundred dollars.

Of a witness.

3d. The recognizance of any prosecutor or witness, in case of misdemeanor, shall not be for less than one hundred dollars, and in case of capital felony, for not less than five hundred dollars. To which

may be added, the following list of offences, to which the statute limits a fine.

	Bail not less than
Gaming or keeping a gaming table,	\$500
Keeping a house for gaming,	2000
Purchasing from a slave cotton, rice, &c.,	1000
Giving, without authority, a ticket to a slave,	1000
Abduction of a free person of color,	1000
Killing a slave in sudden heat and passion,	500
Violating any of the Quarantine rules,	2000

Though a magistrate may not admit to bail in a less amount than is established in the aforesaid act, yet the circumstances of the case may frequently require more, and the amount above the said scale is within his discretion, except that by the declaration of rights, and by the Constitution of 1790, excessive bail shall not be required.

4th. *Refusing or granting Bail illegally.*

Admitting bail where it ought to be denied, is punishable by a fine, or as a negligent escape at common law; and the refusing bail when the party ought to be bailed, is a misdemeanor, punishable not only at the suit of the party, but by indictment. Grimke, 49.

5th. *Of Bail by the Habeas Corpus.*

By the Act of 1839, p. 15, sec. 9, any two magistrates are authorized and required to execute the provisions of an act for the better securing the liberty of the subject, and for the prevention of imprisonment beyond the seas, commonly called the Habeas Corpus Act; and every matter, clause or thing, therein contained, according to their true intent and meaning, as fully, effectually, and lawfully, as any judge of the Court of General Sessions and Common Pleas, or any Chancellor of this State. And if any magistrate shall wilfully neglect, refuse, or omit to grant the writ of Habeas Corpus to any person or persons requesting or demanding the same, who may be legally entitled to request or demand the same by the said act, he shall forfeit for any such default, the sum of five hundred dollars. See *Habeas Corpus*.

Two magistrates may execute.

6th. *When a Judge may admit.*

1st. *Before Conviction.*—The Court of General Sessions, by virtue of its general powers, in criminal matters, may, in term time, or at Chambers, admit a prisoner to bail in all offences and felonies what-

ever. But it is a power to be exercised with discretion, and a party charged with an offence, not bailable by the statute, will not be admitted to bail, unless there are some particular circumstances in his favor. *State vs. Everett, Dudley, 300.*

And in the case of the *State vs. Hill, 1st Tr. C. R., 242*, it was held, the prisoner in a proper case might be bailed, even after indictment found.

2d. After Conviction.—In minor offences, such as assault and batteries, and even in manslaughter, a party may be bailed after conviction pending an appeal, but a party convicted of an infamous offence may not be bailed. *State vs. Frink, 1 Bay, 168*; and *State vs. Connor, 2 Bay, 34.*

BARRATRY.

1st. WHAT IS.

2d. HOW PUNISHED.

1st. What is Barratry.

A Barrator, in legal acceptance, signifies a common mover, exciter, or maintainer of suits or quarrels, either in the Courts, or in the country. 1 Inst., 368. 1 Haw., 243. 1. By disturbance of the peace. 2. In taking or keeping of possession of lands in controversy, not only by force, but also by subtilty and deceit; and most commonly in suppression of truth and right. 3. By false inventions and sowing of calumniation, rumors and reports, whereby discord and disquiet may grow between neighbors. 1 Inst., 368.

No one can be a barrator in respect of one act only, for every indictment for such crime must charge the defendant with being a common barrator. 1 Haw., 243—244.

An attorney is in no danger of being judged guilty of an act of barratry, in respect of his maintaining another in a groundless action, to the commencing whereof he was no way privy. 1 Haw., 243.

Also a man shall not be adjudged a barrator, in respect of any number of false actions brought by him, in his own right; for in such cases he is liable to costs. 1 Haw., 243.

2d. How Punished.

The punishment for barratry is fine and imprisonment at the discretion of the Court, and if the party be of the legal profession, his name will be stricken from the rolls. *State vs. Chitty, 1 Bail, 379.*

BASTARDS.

1st. WHO ARE BASTARDS.

2d. HOW THE MOTHER AND THE FATHER ARE TO BE PROCEEDED
AGAINST.

3d. MURDERING A BASTARD CHILD.

4th. CAPACITY OF A BASTARD AS TO INHERITANCE.

5th. PRECEDENTS.

1st. *Who are Bastards.*

A bastard is one not only begotten, but born out of lawful matrimony, either before marriage, or so long after the death of the husband, that by the usual course of gestation, it could not be begotten by him.

Children born in wedlock may, under some circumstances, be bastards, as where the husband is absent from the country for above nine months before the birth, or the husband and wife live apart under a legal divorce, but not where they live apart by mere voluntary agreement. B. C., 1, 454.

Born out of
wedlock.Absence of
father.2d. *How Father and Mother are to be proceeded against.*

By the Act of 1839, p. 16, sec. 12, any white woman, the mother of a bastard, may voluntarily lodge information before a magistrate as to who is the father; and if she do not voluntarily give such information, and such child be likely to become a burthen to the district, she may be arrested and committed to jail until she declare who is the father of said child, or give security that the said child shall not become chargeable to the said district. The magistrate before whom information is lodged, is required to issue his warrant against the person accused of being the father of a bastard child, and to compel him to enter into a recognizance, with two good and sufficient sureties, in the penal sum of three hundred dollars, conditioned for the payment of twenty-five dollars annually for the maintenance of said child, until the age of twelve years, and to save harmless the said district. If the party refuse to give such recognizance, he shall be committed to prison, there to remain until he shall do so. But if he be unable to comply with the foregoing requisitions, or should he deny that he is the father of the said child, a jury shall be charged in the Court of Sessions to try the question, whether he is or is not the father of such child; and if convicted, shall be required to give the recognizance and security before required, and in default thereof, the

Information
by mother.Warrant
against
father.Refusing to
give bond,
may be
committed.On denial,
bound over
to sessions.

Court shall bind him out to service for any time not exceeding four years, and the proceeds of his labor shall be applied to the purposes aforesaid. By Act of 1847, p. 436, the clause which authorizes the binding out of the defendant, is repealed, and he is liable to execution as in other cases of misdemeanor; such execution to be stayed, except as to costs, on the payment of twenty-five dollars annually.

Bench
warrant.

If the person accused evade or resist the warrant of the magistrate the constable should return the same with special note, on oath, to the Court of Sessions, whereupon a bill of indictment may be given out and if found, a bench warrant may issue. By the old precedents, would seem that proceedings might be had against a woman with child, and the begetter thereof before the birth of the child; but no such authority is given for such proceedings by any Act of the Assembly of this State, and according to the case of *K. and Chandler, Burns, 276*, a child cannot be illegitimate before its birth, there being always a possibility that it may be born in lawful wedlock.

3d. *Murdering a Bastard Child.*

Concealing
the death.

Formerly by the statute 21 J. 1st., c. 27, any woman concealing the death of a child, which, if born alive, would have been a bastard, was liable to suffer death, as in case of murder, unless she could prove by one witness, at the least, that such child was born dead. But the severity of said statute was in a great measure removed by construction, and finally the statute was repealed by the Act of 1795; so that the mere concealment of the birth of a bastard child is no longer to be regarded as proof of its murder; but the question whether the child was, or was not born alive, is a matter to be determined from the whole of the circumstances of the case; and it seems that there must appear some signs of hurt or some marks of violence upon the body to warrant a conviction of the mother for murder. 2 Haw., 438.

Death by
poison.

Procures.

If the death of the child be brought about by a potion taken to procure abortion, it is not murder or manslaughter, unless it appear that it was born alive, and afterwards died of the poison, in which case it is murder, both in the party taking and the party administering; 1 Haw., 80. And if one administer poison to a pregnant woman, for the purpose of procuring abortion, and the woman die thereof, it is murder. 1 H. H., 429; and if a person shall procure a pregnant woman to destroy her infant when born, and the child is born, and the mother in pursuance of that procurement kills the infant, this is murder in the mother, and the procurer is accessory. 1 H. H., 433.

4th. Capacity of a Bastard, as to inheritance.

A bastard can inherit nothing, being looked upon as the son of nobody; but he may take by gift or devise, if he be sufficiently described, and have gained a name by reputation. 1 B. C., 459, n. ^{May take by devise.}
 19. But by the act of 1795, 5th S. L., 271, if any person, living in this State, or having an estate therein, have a lawful wife, he is not at liberty to give, settle, convey, devise or bequeath, in trust or otherwise, to any bastard child or children, or to any woman with whom he lives in adultery, more than one-fourth of his estate, after payment of debts; and such gift, &c. is declared void for so much of the amount ^{Not more than one quarter.} and value thereof as shall or may exceed such fourth part.

*5th. Precedents.**1st. Examination of the Mother.*

SOUTH-CAROLINA, }
 District. }

The examination of A. M., of _____, in the district aforesaid, single woman, taken on oath before me, B. C., one of the magistrates for the said district, this _____ day of _____, in the year _____, who saith that on the _____ day of _____, last past, at _____, in the district aforesaid, she the said A. M., was delivered of a (male) bastard child (insert for particularity the color of the eyes and hair,) and that A. F., farmer of the _____ district of _____, did get her with child of the said bastard child.

Taken and signed the year and day above written, before me.

A. M.

B. C.,

Magistrate.

2d. Information of person other than the mother.

SOUTH CAROLINA, }
 District. }

The information of C. D. of _____ in the district aforesaid, taken on oath before me, B. C., magistrate for the said district, this _____ day of _____ in the year _____ who saith that A. M., a single woman, in the district aforesaid, within _____ months last past, was delivered of a bastard child, and that the same is likely to become chargeable to the district.

Taken and signed the year and day above written, before me.

C. D.

B. C.,

Magistrate.

LAW OF MAGISTRATES.

3d. *Warrant for the mother of a bastard.*

District. }

By B. C., magistrate in and for the district aforesaid.

To any lawful constable.

Whereas, complaint hath been made unto me that A. M., a single woman of the district aforesaid, hath within months last past been delivered of a bastard child, and that it is likely to become chargeable to the district. These are therefore to command you, that you bring the said A. M. before me, at on the day of at o'clock, to be examined touching the premises. Thereof fail not, as you will answer the contrary at your peril. Given under my hand and seal, this day of in the year

B. C., [L. s.]
Magistrate.

4th. *Warrant to apprehend the reputed father.*

District. }

By B. C., magistrate in and for the district aforesaid.

To any lawful Constable.

Whereas A. M., single woman of in the said district, hath, by her examination taken in writing upon oath before me, declared that on the day of last past, she was delivered of a bastard child, and charged A. F., farmer of the said district, with having gotten her with child of the said bastard child. I do, therefore, hereby command you forthwith to apprehend the said A. F., and bring him before me, to be dealt with according to law. Given under my hand and seal, this day of in the year

B. C., [L. s.]
Magistrate.

5th. *Recognizance of the father.*

THE STATE OF SOUTH CAROLINA.

Be it remembered, that on the day of in the year of our Lord one thousand eight hundred and personally appeared A. F., A. B., and C. D., before me, B. C., magistrate in and for the said State, who acknowledged themselves indebted to the State of South Carolina; that is to say, the said A. F. in the sum of three hundred dollars, and the said A. B. and C. D. each in the sum of three hundred dollars, like money, to be levied of their separate lands and tenements,

goods and chattels, respectively, to and for the use of the said State, if the above mentioned A. F. shall fail in performing the condition underwritten.

The condition of this recognizance is such, that if the said A. F. pay the sum of twenty-five dollars annually, for the support and maintenance of a bastard child begotten of A. M., until such child shall be of the age of twelve years, and shall save harmless the district of for the support of said child, then this recognizance to be null and void, or else to remain in full force and virtue.

Taken and acknowledged the day and year above written, before me.

B. C.,

Magistrate.

A. F. [L. s.]

A. B. [L. s.]

C. D. [L. s.]

In case of the mother giving bond rather than declare, let the bond be as above, with a condition merely to save harmless the district.

BAWDS AND BAWDY HOUSES.

A woman cannot be indicted for being a bawd generally, for that the bare solicitation of chastity is not indictable; Haw. 196. But the frequenting a bawdy house is indictable; and it must be expressly ^{Frequenting.} alleged that it is a bawdy house, and not that it is suspected to be so; Wood, p. 3, c. 3. The keeping a bawdy house is indictable as a ^{Keeping.} common nuisance, as it endangers the public peace by drawing together dissolute and debauched persons, and also has a tendency to corrupt the manners of both sexes by such an open profession of lewdness. And it has been adjudged that this is an offence of which a married woman may be guilty; and that she, together with her husband, may be convicted of it. If a person be only a lodger, and have but a single room, yet if she make use of it to accommodate persons in the way of a bawdy house, it will be a keeping of a bawdy house as much as if she had a whole house. 1 Russell, 299.

By the Act of 1836. 6th S. L., 553, any person keeping a bawdy house within ten miles of South Carolina College, or being an inmate ^{Near So. Ca. College.} of such, or who shall gain a maintenance by common prostitution, is liable to be proceeded against as a vagrant; and on conviction, shall be required to enter into recognizance in the sum of two thousand dollars, with two sureties, (free-holders) each in the sum of one thousand dollars, conditioned not to offend against the said act for the

space of three years ; and in default, shall forthwith be committed to the jail of the district, to be dealt with as a vagrant. If any person having given bond shall offend again, such person shall be liable to indictment ; and on conviction, to a fine for each day so offending, not exceeding one thousand dollars, and to imprisonment not exceeding twelve months.

Magistrate
required to
proceed.

Any magistrate is required, upon the written requisition of the faculty of the said college, or of the solicitor of the circuit, suggesting the name of the offender, and the witnesses necessary to the investigation, to arrest the party charged ; and if the testimony appear sufficient, to organize a court as for the trial of vagrants, before which such offender shall be tried and dealt with as before directed ; and every sheriff or constable, to whom any process for the enforcement of the said act may be directed, is required to execute the same with all possible despatch, according to its mandate.

In addition to the fine imposed, the party convicted under the said act is liable to the solicitors costs of three hundred dollars.

BEHAVIOUR, BOND FOR GOOD, AND FOR THE PEACE.

- 1st. FOR GOOD BEHAVIOUR.
- 2d. FOR THE PEACE.
- 3d. AGAINST WHOM GRANTABLE.
- 4th. WHAT SHALL BE A FORFEITURE.
- 5th. HOW DISCHARGED.
- 6th. PRECEDENTS.

1st. *For good behaviour.*

Those who are of ill fame, or common disturbers of the peace, those who are accused, or guilty, of any of the offences hereinafter specified, may be required by one justice to enter into a recognizance, with sureties or without them, according to the discretion of the magistrate, to be of good behaviour ; and upon refusal, may be committed.

The offences for which persons may be bound to good behaviour, are,

Ale houses.

Those who tipple frequently in them, or in taverns.

Bastardy.

Those who are reputed to be the fathers of bastard children ; likewise the mother of such child, if it be *chargeable to the parish*.

Bawdry.

Those who frequent bawdry houses, or who keep them.

Those who cheat by cards, dice, false letters, or any game or games Cheaters and cozeners.
whatsoever.

Convicted by one magistrate, or by proof. Drunkards.

Those who keep or frequent gaming houses, and those who game Gaming.
and have no estates to support themselves.

Those who raise it without cause. Hue and cry.

Those who have no estates, trades, or employments to support Idle persons.
themselves.

Those who contrive, procure, or publish them, whether true or Libels.
false, either against persons living or dead, by writings, words, pic-
tures, or any other signs.

Of any kind whatsoever; this is within the discretion of the magis- Misbeha-
viour.
trate, it being a general word. The expression of justice Blackstone
is: such persons whose misbehaviour may reasonably bring them
within the general words of the statutes, as persons of not good fame;
and a magistrate who commits for want of sureties, must express the
cause with sufficient certainty, and take care that the cause be a good one.

Those who are suspected to steal any thing in the night, or to
commit any misdemeanor against the person and goods of another. Night walk-
ers.

Those who are guilty thereof.

Those of bad report or name.

Quarrels.

Those who keep suspicious company, or are suspected and reported Reputa.
to be pilferers or robbers. Suspicion.

The author of a writing full of obscene ribaldry, without any reflec-
tion on any one, is not punishable by any prosecution; yet he may
be bound to his good behaviour as a scandalous person of evil fame.—
1 Nel., 118. Writings.

2d. For the Peace.

All persons of sane mind, citizens, aliens, infants, and feme covert, Who may
demand it.
have a right to demand sureties for the peace. But to a person not
of sane mind, this surety shall not be granted upon his own request;
but yet if there be cause, the magistrate ought to provide for his safety.
Dalt., c. 117. Nor should it be granted at the request of a drunken
person. Sureties for the peace may be demanded by the magistrate
of persons guilty in any way of breaking the peace, by affrays, By Magis-
trate.
assaults, battery, fighting, quarrelling, riots, suspected to break the
peace, threatening, &c. But it is generally demanded, at the instance
of the party, and is grantable on his oath, that he has just cause to By the party.
fear that another will burn his house, or do him a corporal hurt, or
that he will procure others to do him such mischief, or that another

has threatened to imprison him; for every unlawful imprisonment is assault; 1 Haw. 127. If a man have reason to fear that another will hurt his wife or child, he may crave the peace, but not for his servant or cattle; Dalt., 16. The reason why a man may not crave the peace for his servant, is, that the servant's own oath is necessary, and the reason not applying to the case of a slave, it would seem that a master may crave the peace against a person whom he fears will do some injury to his slave.

For wife and child.
For slave.
Intent. But when a magistrate shall perceive that surety is demanded merely for malice or vexation, without any just cause of fear, he may safely deny it. So, if a man will require the peace, because he is in variance or in suit with his neighbor, it shall not be granted; Dalt. c. 116. And if the parties live at a distance from the magistrate, should not grant surety of the peace, unless application has been made first to a magistrate in the neighborhood. 2 Bur., 780.
Nearest Magistrate.

3d. *Against whom grantable.*

Surety for the peace or good behaviour, may be craved generally against all persons of sane memory; against impotent persons, for whom they may procure another to do an injury; infants, and married women (yet *they* are not bound, only the *sureties*, and a married woman may be required to give such surety on the application of the husband); lunatics, having lucid intervals; but according to Nelson's Justice, is not demandable of one blind, deaf or dumb.

4th. *What shall be a forfeiture.*

By violence, &c. A recognizance for keeping the peace may be forfeited by actual violence, or even an assault or menace to the person of him who demands it, if it be a special recognizance. Or if the recognizance be general, by any unlawful action whatever that either is or tends to be a breach of the peace, or by any crime against the public peace, or by any private violence to any person. But a bare trespass upon the lands or goods of another, unless accompanied with a wilful breach of the peace, is no forfeiture of the recognizance; neither are mere reproachful words, as calling a man a knave, or liar, any breach of the peace, so as to forfeit one's recognizance, unless they amount to a challenge to fight. 4th B. C., 256.

Not by a bare trespass.
Not by words.
For good behaviour. A recognizance for good behaviour may be forfeited by all the same means, as one for the security of the peace may be, and also by some others—as by going armed with unusual attendance to the term of the people, or by committing any of those acts of misbehaviour

which the recognizance was intended to present. But not by giving fresh cause of suspicion of that which may never actually happen; for though it is just to compel suspected persons to give security to the public against misbehaviour that is apprehended, yet it would be hard upon such suspicion, without proof of any actual crime, to punish them by forfeiture of their recognizance. 4th B. C., 257.

5th. How such recognizance may be discharged.

Such recognizance may be discharged by the death of the principal *By death.* party bound thereby, if not before forfeited by order of the Court of Sessions; or by the release of the party at whose request it was *Or by release* granted. 4th B. C., 454.

6th. Precedents.

1st. Affidavit for the peace.

District. }

Personally appeared A. B., who being duly sworn, deposes and says, that he has good reason to fear that C. D. will do, or attempt to do, him some bodily injury, (or that he will do, or attempt to do, some injury to A. F., the wife of deponent) (or A. D., the child, or slave of deponent) or procure the said to be done, and that he does not require the peace of him for any malice, *or vexation,* or revenge, but for the causes aforesaid; and he prays surety for the peace.

Sworn to before me, this day of A. D.,

A. B.

B. C.,
Magistrate.

2d. Warrant for the peace.

SOUTH-CAROLINA. }

District. }

By B. C., magistrate in and for the said State.

To any lawful Constable.

Whereas complaint on oath has been made to me by A. B., that he has good reason to fear bodily injury to himself (or some of his family) from C. D.

These are, therefore, to command you, forthwith to apprehend C. D., and bring him before me, to be dealt with according to law; and herein fail not, under the penalties that shall ensue thereon.

Given under my hand and seal, this day of A. D.

B. C., [L. s.]
Magistrate.

LAW OF MAGISTRATES.

3d. *Warrant for good behaviour.*

SOUTH-CAROLINA, }
 District. }

By B. C., magistrate in and for the said State.

To any lawful Constable.

Whereas it appears to me, from the testimony and complaint of many good and creditable citizens of the said district, that A. O. and B. D., of the said district, (here insert any of the causes for which the party is to be bound for good behaviour.)

These are, therefore, to command you, forthwith to arrest the said A. O. and B. D., and bring them before me, to be dealt with according to law; and herein fail not, &c.; and have you before me this precept.

Given under my hand and seal, this day of A. D.

B. C., [L. s.]
 Magistrate.

4th. *Recognizance for the peace, and good behaviour.*

THE STATE OF SOUTH CAROLINA.

Be it remembered, that on the day of A. D. personally appeared A. O., B. D. and E. F., before me, B. C., magistrate in and for the said State, who acknowledged themselves indebted to the State of South Carolina; that is to say, the said A. O. in the sum of and the said B. D. and E. F. each in the sum of like money, to be levied of their separate lands and tenements, goods and chattels, respectively, to and for the use of the said State, if the above mentioned A. O. shall fail in performing the condition underwritten.

The condition of this recognizance is such, that if the said A. O. do keep the peace of the State, and be of good behaviour towards all the citizens thereof (if it be at the request of a private person, add, "and especially towards such person,") for a year, then this recognizance to be null and void, or else to remain in full force and virtue.

Taken and acknowledged the year and day above written, before me.

B. C., A. O. [L. s.]
 Magistrate. B. D. [L. s.]
 E. F. [L. s.]

5th. *Commitment.*

SOUTH-CAROLINA. }
 District. }

By B. C., magistrate in and for the said State.

To any lawful Constable, and the keeper of the common jail in said district.

Whereas A. O., of the said district, is now brought before me, B. C., magistrate in and for the said State, on a charge requiring him to find sufficient sureties to keep the peace of the State, and be of good behaviour towards all the citizens thereof (and "especially towards A. B.") for a year; and whereas he, the said A. O., hath refused, and doth now refuse before me, to find such sureties: These are, therefore, to command the said constable forthwith to convey the said A. O. to the common jail of the said district, and to deliver him to the keeper thereof, together with this precept; and you, the said keeper, are hereby required to receive the said A. O. into your custody in the said jail, and him there safely keep until he shall find such sureties as aforesaid.

Given under my hand and seal, this day of A. D.
B. C., [L. s.]
Magistrate.

6th. *Discharge.*

SOUTH CAROLINA, }
District. }

By B. C., magistrate in and for the said State.

To the keeper of the jail for the said district, greeting:

Forasmuch as A. O., in your custody now, for want of his finding sureties to keep the peace of the State, and be of good behaviour, hath found before me sufficient sureties in that behalf: These are, therefore, to authorize and require you, that if the said A. O. do remain in jail for no other cause, then you forbear to detain him any longer, but suffer him to go at large, and that, upon the pain that will fall therein.

Given under my hand and seal, this day of A. D.
B. C., [L. s.]
Magistrate.

BENEFIT OF CLERGY,

Is an indulgence allowed by the law to persons convicted of certain offences for the first time, and who, but for such indulgence, must suffer death for such offence.

1st. *When allowable.*

According to the summary of Justice Blackstone:

1st. In all felonies, whether new, created, or by common law, clergy is allowable, unless taken away by express words of a statute.

2d. That where clergy is taken away from the principal, it is not of course taken away from the accessory, unless he be also particularly included in the words of the statute.

3d. That when the benefit of clergy is taken away from the offence, (as in case of murder, buggery, robbery, rape, arson, and burglary) a principal in the second degree being present, aiding and abetting the crime, is as well excluded from his clergy as he that is principal in the first degree.

4th. But where it is only taken away from the person committing the offence, (as in the case of stabbing, or committing larceny in a dwelling house, or privately from the person,) his aiders and abettors are not excluded through the tenderness of the law, which hath determined that such statutes shall be taken literally.

To which may be added,

5th. That a party convicted of an offence, from which clergy has not been taken away, can have that plea but once.

2d. Consequences.

After a party has been allowed the benefit of clergy, and has received the judgement of the law, (as formerly by branding, but now by fine, imprisonment and whipping) or pardon, he is discharged forever of that and all other clergyable felonies before committed, but not of felonies from which clergy is excluded; and he is restored to all his rights and credits, as if he never had been convicted. 4th B. C., 375.

B I G A M Y.

Definition. This term properly signifies a double marriage, or being twice married, but it is universally used in the sense of polygamy, or the having a plurality of wives or husbands at once.

By statute 1 J. 1, c. 11, P. L., it is enacted, that if any person or persons, being married, do at any time marry any person or persons, the former husband or wife being alive, that then every such offence shall be felony, and the person and persons so offending shall suffer death, as in cases of felony, and the party and parties, so offending, shall receive such and the like proceeding, trial, and execution in such county where such person or persons shall be apprehended, as if

the offence had been committed in such county where such person or persons shall be taken or apprehended—of which he shall inquire:

1st. WHAT CASES OF SECOND MARRIAGE ARE WITHIN THE STATUTE.

2d. OF THE CONSEQUENCES TO THE ISSUE OF SUCH SECOND MARRIAGE.

3d. OF THE PUNISHMENT.

1st. *What cases of Second Marriage are within the Statute.*

By the term of the statute, 2nd section, it is provided, that it shall not extend to any person or persons whose husband or wife shall remain continually beyond the seas, by the space of seven years ^{Husband or wife absent for seven years.} together, or whose husband or wife shall absent himself or herself, the one from the other, by the space of seven years, in any part within his Majesty's dominions, the one of them not knowing the other to be living within that time; and by the third section, persons divorced, or ^{Persons divorced, &c.} who were married before the age of consent, are excepted from the statute. In addition to these exceptions of the statute, it hath been ruled, that if the husband or wife be under sentence of imprisonment ^{Under imprisonment for life.} for life, the other may marry again, and such marriage will not be within the statute against bigamy. 4th B. C., 165, note 7.

Concerning the exception of persons divorced, it may be necessary to remark, that the Legislature of South-Carolina has uniformly refused to grant a divorce in any case, and it seems to be the prevailing opinion, that the dissolution in another State of a marriage contract, entered into in South-Carolina, would not be regarded by the Courts of the latter State, if under their jurisdiction; and if a person, so divorced, marry again, he would be held guilty of bigamy. See *Carolina Law Journal*.

2d. *Of the consequences to the issue of such Second Marriage.*

Where either party to a second marriage is guilty thereby of bigamy, the marriage is itself void, and the issue thereof illegitimate; ^{Illegitimate.} and even although a second marriage be within the first three exceptions of the statute, still it will be void in law, though neither party thereto be guilty of felony; 4th B. C., 164. But in this State it hath been held, that the death of a party will be presumed, after an absence of seven years without the State, without having been heard from; and that the party deserted, is free to marry after that time, and the issue of such marriage are legitimate. *Woods vs. Woods*, 2 Bay, 476.

3d. Punishment.

By the terms of the statute, "the person and persons so offending shall suffer death as in cases of felony;" so that clergy not being taken away by the express words of the statute, bigamy is held to be a clergyable offence; and under the law of this State, before the Act 1833, was punished with branding, imprisonment, &c.; but now, if branding is wholly abolished, it is only punishable by fine and imprisonment for the first offence.

B R A N D I N G.

Abolished. By the Act of 1836, 6th S. L., it is enacted, "that from and after the passing of this act, the punishment by branding shall be abolished in all cases, and in lieu thereof, in the cases of free white persons, punishment by fine and imprisonment shall be substituted."

B R E A D.

Every common baker, or other person, who shall make or bake for sale, or expose to sale ~~any of~~ the sorts of bread mentioned in the following table, shall fairly imprint or mark, or cause to be fairly imprinted or marked, on every loaf so by him or her made, or exposed to sale, the price of such loaf, together with the initial letters of the name of the baker thereof, whereby the said baker and price of such bread may be distinctly known; and shall make such bread agreeable to the weight in the following table, otherwise he (who shall be convicted to the contrary, by the confession of the party, or by oath of one or more credible witnesses, before a justice of the peace in the county where the offence shall be committed,) shall for every such offence, forfeit the sum of twenty shillings, proclamation money, to be levied by warrant under the justice's hands, and given to the informer. A. A., No. 799.

If any baker put into any bread by him sold, or exposed to sale any mixture of other grain, further than what is absolutely necessary for the well-making or baking thereof, he shall, for every such offence upon conviction before any justice trying and examining the same forfeit all such bread so fraudulently mixed, for the use of the poor.

the parish where the offence shall be committed, and also the sum of twenty shillings, proclamation money, for the use of the informer, to be recovered by warrant from the justice; provided the prosecutions for such convictions be commenced within three days next after the offence is committed.—Ib.

Any justice of the peace may, at all times in the day time, enter into any house, shop, stall, bake-house, ware-house, or out-house of or belonging to any baker, or seller of bread, and there search for, view, weigh and try all, or any of the bread which shall there be found; and if any be found either wanting in the goodness of the materials whereof the same shall be made, or deficient in the baking, or wanting in the due weight, or not truly marked, or fraudulently mixed, then, and in every such case, any justice may seize such bread so found, and cause the same to be forthwith given and distributed to the poor of the parish where such seizure shall be made. And if any baker or seller of bread shall not suffer such search and seizure to be made, or resist the same, he shall, for every such offence, forfeit the sum of four pounds, proclamation money, for the use of the poor of the parish where the offence is committed, to be levied by a warrant under the justice's hands.—Ib.

But if any person convicted, of any of the offences before mentioned, think himself aggrieved, he may, within three days after such conviction, appeal in writing to any three justices of the peace for the county where such conviction shall be made, by whom the same shall be heard and finally determined, in ten days after such appeal; and if the person so appealing shall not make good his appeal, or prosecute it with effect, the justices shall award such costs as they shall think reasonable to the informer, and commit the offender to the common jail until he shall make payment of such costs, and also of the penalty adjudged on the conviction; the like reasonable costs shall be awarded to the appellant against the informer, if he does not duly support and make good his information.—Ib.

5. The City Council of Charleston has full power and authority to regulate from time to time the price and assize of bread. A. A. No. 1342.

1. *Information of an undue mixture used in making of bread.*

District. } ss.

Be it remembered, that this day of in the year A. A. yoman, in his proper person exhibiteth to me, I. P. one of the justices

assigned to keep the peace of the district aforesaid, a complaint and information, and thereby informeth me, that A. O., late of , in the district aforesaid, baker, on the day of , [here specify the time of the offence, that the prosecution may appear to be commenced in three days after the offence committed, according to the Act of Assembly in that case made and provided,] did put into and use, in the making of bread, to be sold, a preparation or mixture, in which alum was an ingredient, contrary to the form of the Act of Assembly, in that case made and provided, whereby the said A. O., hath forfeited the sum of twenty shillings, proclamation money; and thereupon the said A. I., prayeth the judgement of me the said justice in that behalf, and that he the said A. I., may have the said forfeiture, according to the form of the Act of Assembly in such case made and provided, and that the said A. O. may be summoned to answer the premises before me the said justice.

2. Summons thereupon.

District. } ss.

To A. B. constable of the District aforesaid.

Whereas complaint and information hath been exhibited before me, I. P., one of the justices of the peace for the said district, by A. I., yeoman, that A. O. late of , in the district aforesaid, baker, on the day of , in the year , did put into and use, in the baking of bread, to be sold, a preparation or mixture, in which alum was an ingredient, contrary to the form of the Act of Assembly in such case made and provided; these are therefore to require you, forthwith to summon the said A. O. to appear before me, at , on the day of , at the hour of in the forenoon of the same day, then and there to answer the said information: and be you then there to certify what you shall have done in the premises. Herein fail you not.

Given under my hand and seal, the day of , in the year
I. P. [L. s.]

If the party shall not appear on such summons, or offer some reasonable excuse for his default, then, on oath made of the offence, by one witness, such justice shall issue his warrant (*mutatis mutandis*) to apprehend the offender, and bring him before the said justice, to answer the said information.

On the party's appearance, or if he do not appear, then on proof of the summons being given to him, or left at his usual place of abode, or if he cannot be apprehended by warrant as aforesaid, the justice may proceed to hear and determine the offence.

3. *The form of the conviction.*

District. } ss.

Be it remembered, that on this day of in the year A. O. is convicted before me, I. P., one of the justices assigned to keep the peace in and for the district aforesaid, for putting into and using in the making of bread, to be sold, a preparation or mixture, in which alum was an ingredient; and I do adjudge him to pay and forfeit for the same, the sum of 20s. proclamation money. Given under my hand and seal the day and year aforesaid.

I. P. [L. s.]

4. *Warrant of distress on non-payment of the penalty.*

District. } ss.

To A. B., Constable of the District aforesaid.

Forasmuch as A. O., late of in the district aforesaid, baker, was on the day of duly convicted before me, I. P. Esq., one of the justices of the peace for the said district, by the oath of A. W., a credible witness, for that he, the said A. O., on the day of did put into and use in the making of bread, to be sold, a preparation or mixture, in which alum was an ingredient, against the form of the act of assembly in such case made and provided, by reason whereof I did adjudge, and have adjudged him to pay and forfeit for the said offence the sum of 20s. proclamation money;

And whereas it appears to me, that the said sum, or any part thereof, is not yet paid; I do therefore hereby authorize and require you, forthwith to make distress of the goods and chattels of him, the said A. O., and also to cause the said goods, by you seized, to be appraised and sold; rendering the overplus to him, the said A. O., after deducting the said sum of 20s. proclamation money, and also the costs and charges of the prosecution for the said offence, and of the said distress and sale; which costs and charges I do hereby ascertain at the sum of

and the said sum of 20s. proclamation money, so forfeited as aforesaid, you are to pay to A. I., yeoman, who informed me of the said offence, and prosecuted to conviction him, the said A. O., before me, for the same; and if sufficient distress cannot be had or found whereupon to levy the said sum of 20s. proclamation money as aforesaid, you are hereby required to certify the same to me, together with the return of this precept. Herein fail you not. Given under my hand and seal, the day of in the year

I. P. [L. s.]

LAW OF MAGISTRATES.

5th. *Return of the want of distress endorsed upon the warrant.*

District. } ss.

I, A. B., constable in the district aforesaid, do hereby certify I. P. Esquire, one of the justices of the peace for the said district, that by virtue of this warrant, I have made diligent search for the goods and chattels of the within mentioned A. O., and that I can find no sufficient goods and chattels of him, the said A. O., whereon to levy the within mentioned sum of 20s. proclamation money. Witness my hand the day of in the year A. B.

Sworn before me, the said justice, the day and year aforesaid.

I. P.

BRIBERY.

[See also *EMBRACERY and OFFICES.*]

- 1st. DEFINITION.
- 2d. PREVENTION.
- 3d. ITS EFFECTS.
- 4th. PUNISHMENT.
- 5th. MODE OF PROCEDURE.

1st. *Definition.*

Bribery is the receiving or offering any undue reward by or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behaviour. And it seems that this offence will be committed by any person in an official situation, who shall corruptly use the power or interest of his place for reward or promises; also in giving or taking rewards for offices of a public nature, or in giving rewards, or making promises, to secure votes at an election. 1st Russel, 156.

2d. *Prevention.*

Oath of officer.

In addition to the punishment of bribery by the common and statute law, the legislature of South-Carolina has prescribed for the prevention thereof, the following oath, to be taken by each district officer before entering upon the duties of his office, viz :

I, A. B., swear or affirm as the case may be, that I am under no promise in honor or law to share the profits of the office to which I

have been elected or appointed, (as the case may be,) and I will not directly or indirectly, sell or dispose of said office, or the profits thereof, but will resign or continue to discharge the duties thereof during the period fixed by law, if I so long live, so help me God.

3d. *Effect of Bribery.*

In addition to the punishment inflicted upon a person guilty of bribery, he is also subject to be deprived of any undue advantage which he may gain thereby, whether it be the getting a verdict in his favour, in which case it may be set aside as fraudulent, or whether it be the procuring thereby his election to any office; for it hath been held that bribery rendered an election void, as early as 13th Eliz., when one Thomas Louge, (being a simple man, and of small capacity, to serve in parliament) acknowledged that he had given the returning officer and others of the borough for which he was chosen, four pounds, to be returned as a member, and was for that premium elected; by this offence the borough was amerced, the member was removed, and the officer fined and imprisoned. 1 B. C., 179.

4th. *Punishment.*

Besides the punishment imposed by statute, bribery is a crime at common law for which the parties may be indicted and punished by fine and imprisonment. 4 Doug., 292.

In inferior, judicial or ministerial officers, it is punishable by fine and imprisonment, which also may be inflicted on those who offer a bribe, though it be not taken; 3 Just., 147. In a judge, it was formerly looked upon as so heinous an offence, that it was sometimes punished as high treason; and it is at this day punishable with forfeiture of office, fine and imprisonment.—Ibid, 146.

Acts of Congress.

By Act of Congress of 1790, 1st Story's L. U. S., 87; if any person shall directly or indirectly give any sum or sums of money, or any other bribe, present or reward, or any promise, contract, obligation or security, for the payment or delivery of any money, present or reward, or any other thing to obtain or procure the opinion, judgement, or decree of any judge or judges of the United States, in any suit, controversy, matter or cause depending before him or them, and shall be convicted thereof, such person or persons so giving, promising, contracting, or securing to be given, paid, or delivered, any sum or sums of money, present, or reward, or any other bribe as aforesaid, and the judge or judges who shall in any wise receive or accept the

same, on conviction, thereof shall be fined and imprisoned at the discretion of the Court, and shall forever be disqualified to hold any office of honor, profit, or trust, under the United States.

Officers of
the customs.

And by the Act of 1799, 1st S. L. U. S., 653; if any officer of the customs shall directly or indirectly take or receive any bribe, or recompense, for conniving, or shall connive at any false entry on any ship or vessel, or of any goods, wares or merchandize, and be convicted thereof, every such officer or other person shall forfeit and pay a sum not less than two hundred, nor more than two thousand dollars for each offence. And said penalty shall be sued and recovered, with costs of suit, in the name of the United States of America, in any Court competent to try the same; and the fact which may be put in issue, shall be within the jurisdiction in which such penalty shall have accrued, and the collector is enjoined to cause suits for the same, to be commenced without delay and prosecuted to effect.

Act of Assembly.

Punishment
for bribery
for office.

By Act of 1824, 6th S. L., 244, if any person shall directly or indirectly give or engage to pay any sum of money or other valuable consideration to another, in order to induce such other person to procure for him by his interest, influence, or any other means whatsoever, any office or place of trust within this State, or shall give, promise or bestow, any reward by meat, drink or other valuable consideration for the aforesaid purpose, and be thereof convicted, he shall forfeit a sum of not less than one, nor more than five hundred dollars, and suffer imprisonment for a term not exceeding six months.

Receiving
reward.

If any person shall receive of another any sum of money or other valuable consideration, for procuring or inducing to procure, any office or place of trust in this State, for any person whatever, and be thereof convicted, he shall forfeit the sum of not more than one hundred dollars, and suffer imprisonment at the discretion of the Court; and if such offender be in any office, he shall be disabled from holding the same.

Informers
free from
penalty.

If either of the parties offending as aforesaid, shall give information against the other offending party, and shall duly prosecute such information, such informer shall be free from the penalty.

5th. Mode of Procedure.

Indictment.

The proceeding for bribery, at common law, is by indictment, though no method of proceeding is proscribed by the Acts of Co-

and statutes of the State, yet as they make no new offence, but only add punishment to an offence at common law, by a well settled rule of law; 2 Haw., 302, the proceedings on said acts is by indictment, except in the case of officers of the customs, where, according to the act, the remedy is by action in the name of the United States, By action. in any Court of competent jurisdiction.

Of the Affidavit.

In the case, the offence charged be at common law, for offering a bribe to a judge, or other person occupying official station, or for receiving such bribe by one in such station, the affidavit should set forth all the particulars, to-wit: the station of the officer, the nature of the case pending before him, and the time, place and manner of offering or receiving the bribe, together with the nature of the thing offered. If it fall within either of the foregoing statutes, then the circumstances should be set forth in the affidavit, and nearly as possible in the words of the statute, stating the nature of the case pending, or the office sought to be procured, as also, the date, time and place of the offering of the bribe and of the election.

Form of Warrant.

STATE OF SOUTH CAROLINA. }
District. }

By , Esq., magistrate, in and for the said State.

To any lawful Constable.

Whereas, complaint upon oath has been made unto me by A. B., that C. D. did on the day of (Here state the matter charged, following the affidavit.)

These are, therefore, to command you to apprehend the said C. D., and to bring him before me, to be dealt with according to law.

Given under my hand and seal, at , this day of , one thousand eight hundred and

E. F., [L. s.]

Magistrate.

THE STATE OF SOUTH-CAROLINA.

Be it remembered, that on the day of in the year of our Lord one thousand eight hundred and personally appeared C. D., and (name of surety or sureties,) before me, magistrate in and for the said State, who acknowledged themselves indebted to the State of South-Carolina; that is to say, the said C. D. in the sum of (the highest amount of penalty for the offence, adding thereto for the

LAW OF MAGISTRATES.

imprisonment) dollars: and the said (surety or sureties, if one, in the same amount, and if two, then each in half the amount) dollars, like money, to be levied of their separate lands and tenements, goods and chattels, respectively, to and for the use of the said State, if the above mentioned C. D. shall fail in the performing the condition underwritten.

The condition of this recognizance is such, that if the said C. D. shall personally appear before the Court of General Sessions, to be holden at the usual place of judicature, in , on the Monday in , then and there to answer to a bill of indictment to be preferred against (him or her) for (here state the charge fully as in the warrant,) and to do and receive what shall be enjoined by the Court, and not to depart the Court without license; and in the mean time, that the said C. D. do keep the peace of the State, and be of good behaviour towards all the citizens thereof, and especially towards the said , then this recognizance to be null and void, or else to remain in full force and virtue.

Taken and acknowledged the day and year above written, before me.

E. F.,

Magistrate:

C. D. [L. s.]

Surety, [L. s.]

Surety, [L. s.]

If the charge be for an offence against the act of Congress, then insert ("the United States of America") wherever the name "South-Carolina" is used in the above precedent.

B U R G L A R Y .

Definition. It is laid down in the more ancient authorities, that the offence of burglary may be committed by the felonious breaking and entering of a church, and the walls or gates of a town, in time of peace, as well as by the felonious breaking and entering of a private house. But the more material enquiry, at the present day, relates to the breaking and entering of the mansion houses of individuals; and this species of offence may be well described as the breaking and entering the mansion house of another in the night, with intent to commit some felony within the same, whether such felony be committed or not. 2 Russel, p. 1.

- 1st. THE BREAKING AND ENTERING.
- 2d. OF THE MANSION HOUSE.
- 3d. THE TIME.
- 4th. THE INTENT.
- 5th. OF THE PUNISHMENT.
- 6th. REWARD FOR CONVICTING A BURGLAR.
- 7th. PRECEDENTS.

1st. *The Breaking and Entry.*

It is now well settled that there must be both a breaking and an entry, and it is not every entrance in the nature of a trespass, which will be sufficient to satisfy the language of the law. Thus, if a man enter through a door or window, which he finds open, or a hole which was there before, and steal goods, he will not be guilty of burglary; but there must be an actual breaking, requiring more or less force, or a breaking by construction of law, as where an entrance is obtained by threats, fraud or conspiracy. 2 Russ., p. 2.

An actual breaking may be by making a hole in the wall, forcing open the door, picking the lock, or opening it with a false key, breaking or taking out the window glass, and even lifting the latch, where the door is not otherwise fastened, or turning the key which is in the lock, or the unloosing the fastening which the owner has provided, will amount to a breaking.—Ib.

Also, the getting down or into the chimney of a house, is a sufficient breaking, though the party does not enter any of the rooms of the house.—Ib.

It should also be observed, that the breaking requisite to constitute a burglary, is not confined to the external parts of the house, but if the offender enter a house by means of a way which he has found open, and afterwards break an inner door, it is burglary.—Ib.

If one or more, with felonious intent, gain entrance into a house by threats of violence, or by raising hue and cry, or by pretence of legal process, or by pretence of business with the occupant, or taking lodgings, or by deluding the servant in charge, or by conspiracy with a servant who opens the door, such arts will amount to a constructive breaking, sufficient to constitute burglary, and in the latter case, the servant who opens will also be held guilty.—Ib.

With respect to the entering, necessary to constitute burglary, it is agreed that any, the least entry, either with the whole, or any part of the body, hand or foot, or with an instrument or weapon, introduced for the purpose of committing a felony, will be sufficient. Thus, where

a person in the night time, cut a hole in the window shutters of a shop which was part of a dwelling-house, and putting in his hand, took out watches, it was holden to be burglary.—Ib.

By an instrument.

So, if a thief breaks the window of a house in the night time, with intent to steal, and puts in a hook or other engine to reach out goods, or puts a pistol in at the window with intent to kill, this is burglary, though his hand be not within the window. 1 Hale, 553.

Breaking and entry need not be the same night.

Though there must be both a breaking and entry to constitute burglary, yet they need not both be at the same time, or on the same night; and the entry of one is the act of all present, aiding and abetting. 2 Russ., 12.

2d. Of the House.

What shall be considered a mansion house.

The breaking and entry must be of a mansion house, which includes any home, for the dwelling and habitation of man; and a portion of a building may come under this description, as a set of chambers in a college or inn, or a loft over a coach house and stables.—Ibid.

Not a tent or booth.

Burglary however, cannot be committed by breaking into an enclosed ground, or booth or tent, though the owner may lodge therein, for the law regards thus highly nothing but permanent edifices; and the lodging of the owner in so frail a tenement, no more makes it burglary to break it open, than it would be to uncover a tilted wagon in the same circumstances.—Ibid.

Not in a store or out-house.

The mansion or dwelling house in which burglary might be committed, was formerly held to include out-houses, such as stables, barns, &c., though not under the same roof, or joining to the dwelling. But in the case of the State vs. Ginns, 1 N. & M'C., 583, it was held that it was not burglary to break and enter a store in the night time, in which no one sleeps, and which is not connected with the dwelling, except by a fence; and in the same case, the judges inclined to the opinion, that a house to be parcel of the mansion house, must be somehow connected with, or contributing to it, as a kitchen, smoke-house, or other usual appendage of a dwelling house. It is well settled, that unless the owner has taken possession of the house by inhabiting it personally or by some of his family, it will not have become his dwelling in the meaning of the word as applied to burglary, and this has been held, even in cases where the owner was about to occupy a house and placed persons not a part of his family in it to protect it. 2 Russ., 16.

How far it must be inhabited.

Not affected by temporal absence.

But if the owner occupy the house with any part of his family or servants, or he had dwelt there, and was only temporarily absent, with intention of returning, it will be regarded as his mansion-house. Ibid.

3d. Of the time.

To constitute burglary, the offence must be in the night; and it is ^{Must be in the night.} settled, that if there be daylight or twilight enough begun or left whereby to distinguish the countenance of a person, it is no burglary. But this does not extend to moonlight. 1 Hale, 550.

We have before said, that the breaking and entry need not be in the same night, but that a breaking one night, and an entry another, will be sufficient; but whether the breaking and entry must both be in the night time, and whether a breaking in the day and an entry at night be not sufficient, is yet a question.

4th. Of the intent.

The breaking and entering must be with a felonious intent, or it ^{Must be felonious} will not be burglary; but it is not necessary that such intent be executed. If the intention of the entry be a mere trespass, as to beat a person in the house, such entry will not be burglary. But if a felony be actually committed, it will generally be held evidence of an intention to commit it; and it makes no difference whether the felony committed, be a felony at common law, or by statute. 2 Russ, 33.

5th. Punishment.

By the 18 El., c. 7, and 3 W., c. 9, benefit of clergy is taken away, in the cases of burglary, both from the principal and the accessory before; but in all cases of burglary, accessories after must have their clergy. 2 H. H., 364. 1 Haw, 357, 358.

Such being the punishment, a party charged with the offence is not bailable by a magistrate.

6th. Reward for convicting a burglar.

It may be observed, in the first place, that it is provided by the 24 H. 8, c. 5; that there shall be no forfeiture of lands or goods for killing any person that attempts to commit burglary.

But besides this indulgence to a person killing such an offender in defence of his house, there are special advantages and rewards, for apprehending and convicting him, in due course of law, which are as follows:

Every person, who shall apprehend any white person guilty of burglary, or the felonious breaking and entering of any house in the day time, and prosecute him until he be convicted of such burglary or felony, shall have ten pounds, proclamation money, within one month ^{Ten pounds.} after such conviction, to be paid by the treasurer of this State out of any monies in the treasury, to the person apprehending and prosecu-

ting the said offender, he rendering a certificate to the said treasurer under the hand of the judge before whom such felon shall be convicted for such burglary or felony, certifying the conviction of such felon the said offence, and also that such felon was taken by the persons claiming the said reward: and in case any dispute shall arise between the persons so apprehending the said felons, touching their right to the said reward, the said judge so certifying as aforesaid, shall, by certificate, direct the said reward to be paid to the parties claiming the same, in such proportions as to the said judge shall seem just. A., No. 1096.

In case any person having a wife or child living, shall be killed, maimed, or disabled from labour, by any such burglar or house-breaker, in endeavouring to apprehend, or in making pursuit after him, such person, in case he shall be maimed or disabled, shall be entitled to the same rewards as are allowed by the militia act to poor freemen and white servants, maimed or disabled in the public service, and in case such persons shall be killed, then the wives and children of such persons shall be entitled to the same rewards as the wives and children of poor freemen and white servants, killed in the public service, are entitled unto by virtue of the said act, upon a certificate under the hands and seals of two of the next justices of the peace, such person being so killed, maimed, or disabled from labour; and by certificate, the said justices, upon sufficient proof before them made, are immediately required to give, without fee or reward.—Ib.

The judge before whom such felons, and house-breakers, and receivers of stolen goods, knowing them to be such, shall be convicted shall determine and settle the right, and shares of such respective persons, who, by virtue of this act, shall be entitled to the certificate and reward, herein directed to be given; and shall also (being thereunto required,) cause to be made out and delivered, the said certificate without fee or reward, to such person entitled thereunto, before the end of such sessions wherein such conviction shall be had.—Ib.

7th. *Precedents.*

1st. *Affidavit, requisites of.*—The foregoing summary of the offence of burglary may be sufficient for the guidance of the magistrate, in such cases as he may be called on to try. But as questions of ownership may arise in the Court of Sessions, it were better that the magistrate drawing the affidavit should observe the following direction: 1st. State all the circumstances of the breaking and entering, whether they seem to be pertinent or not. 2d. Set forth the

names of the owner and occupant of the house, and whether the occupant held as tenant, or as the agent or servant of the owner. State whose and what goods were stolen; as a party may be acquitted of the burglary, and convicted of the larceny.

2d. *Warrant to apprehend a burglar.*

District. } ss.

To A. B. constable of the District aforesaid.

Forasmuch as A. I., of in the district of yeoman, hath this day made information and complaint, upon oath before me, I. P. Esquire, one of the justices appointed to keep the peace for the said district, that yesterday in the night, the dwelling house of him, the said A. I., at aforesaid, in the district aforesaid, was feloniously and burglariously broken open, and one silver tankard, of the value of five pounds, of the goods and chattels of him, the said A. I., feloniously and burglariously was stolen, taken, and carried away from thence: and that he hath just cause to suspect that A. O., late of in the district of labourer, the said felony and burglary did commit: these are therefore to command you, that immediately upon sight hereof, you do apprehend the said A. O., and bring him before me, to answer the premises, and to be further dealt withal, according to law. Herein fail you not. Given under my hand and seal, the day of in the year [L. s.]

B U R N I N G .

[See ARSON and MALICIOUS MISCHIEF.]

Under this head are included certain statutory offences not included under the head of arson, which are felonies or misdemeanors.

1. *Felonies.*

By 22 and 23 C. 2, c. 7, S. L. 2, 521; if any person in the night time, maliciously, unlawfully, and willingly burn, or cause to be burned or destroyed, any ricks or stacks of corn, hay, or grain, barns, ^{Burning corn &c.} or other houses, or buildings, or kilns, he shall suffer as in case of felony.

By 37 H. 8, c. 6; if any person or persons, maliciously, unlawfully, willingly and secretly, burn, or cause to be burned, cut, or ^{Burning or cutting frames.} caused to be cut or destroyed, any frame, or frames of timber, of any

other person or persons, made and prepared for, or towards the making of any house, or houses, so that the same shall not be able for the purpose for which it was prepared; that then every such act, and acts so to be committed, perpetrated, and done by any person or persons, shall be deemed and adjudged felony; and, by this act, it is provided, that the offender shall have and suffer pains of death; but as clergy is not expressly taken away, it follows that he shall have his clergy.

Ships. If any master, mariner, or other officer belonging to a ship, shall wilfully cast away, burn, or otherwise destroy the ship unto which he belongeth, or procure the same to be done, to the prejudice of the owner or owners thereof, or of any merchant that shall loan goods thereon, he shall suffer death as a felon. 1 Ann. S. 2, c. 9, P. L., 93.

Misdemeanors.

**Burning
coals, etc.**

If any person wilfully, maliciously and unlawfully burn or cause to be burned, any wagon or cart, loaded with coals or other merchandize, or any heaps of wood, prepared, cut and felled, for the making of coals, billets or salwood, such person shall not only lose and forfeit unto the party grieved, treble damages, to be recovered by trespass, but shall also lose and forfeit, for every such offence, £10 sterling, in the name of a fine. 37 H. 8, c. 6, 2 S. L., 478.

**Burning
woods.**

No person shall put fire to or burn any grass, brush, or other combustible matter, so as thereby the woods, fields, lands, or marshes, be set on fire; nor cause the same to be done, nor be thereunto aiding or assisting, under the penalty of £5, half to the informer, the other half to the use of the poor of the parish or county in which the offence shall be committed: and in default of payment, he shall suffer imprisonment, not exceeding two months; and shall be liable to the action of any person who shall have suffered damage thereby. *Provided*, that no person shall be prevented from firing woods, fields, lands or marshes, within his own bounds, so that he suffer not the fire to get without the bounds of his lands, and injure the woods, fence or grass of his neighbor: and where any offence shall be committed by any servant or slave, without the direction, consent or knowledge of his master, he shall receive not exceeding thirty-nine stripes, at the discretion of the justice and freeholders before whom he shall be convicted, unless his master shall pay the damage which the owner of the lands shall sustain, and costs of suit. A. A., No. 1586.

**Burning
barns, etc.,
in day.**

If any person shall maliciously, unlawfully and wilfully burn or cause to be burned or destroyed, any ricks or stacks of corn or grain,

barn or other house, or other buildings, or kiln, in the day time, such person shall be adjudged guilty of a misdemeanor, and liable to be fined and imprisoned at the discretion of the Court. 6th S. L., 368.

C A R D S .

(See GAMING.)

C A R R I E R S .

All persons carrying goods for hire, as masters and owners of ships, who are lightermen, stage-coachmen, and the like, come under the denomination of common carriers, and are chargeable, on the general custom of the realm, for their faults or miscarriages. 1 Bac. Abr., 543.

1st. His Duties and Responsibilities.

A carrier shall not evade the law, by refusing to carry goods at the prices limited; for if a common carrier, who is offered his hire, and ^{Bound to carry.} who hath convenience, refuses to carry goods, he is liable to an action, in the same manner as an inn-keeper who refuses to entertain a guest, or a smith who refuses to shoe a horse. 1 Bac. Abr., 344.

So an action will lie against a common ferryman, who refuseth to carry passengers.—Ib.

Where goods are to be delivered to a carrier, and he is robbed of them, he shall be charged, and answer for them, by reason of the ^{Liable for damage.} hire: and this was at the common law, before the hundred was answerable over to him; because such robbery might be, by consent and combination, carried on in such a manner that no proof could be had of it. 1 Salk., 143.

And although it may be thought a hard case, that a poor carrier, who is robbed on the road, without any manner of default in him, ^{Liable though robbed.} should be answerable for all the goods he takes; yet the inconvenience would be far more intolerable, if he were not so, for it would be in his power to combine with robbers, or to pretend a robbery, or some other accident, without a possibility of remedy to the party; and the law will not expose him to so great a temptation, but he must be honest at his peril. 12 Mod., 482.

And generally, if a man delivers goods to a common carrier, **For damage.** carry to a certain place, if he loses or damages them, then an action lies upon the case against him; for by the custom of the realm he is bound to carry them safely. 1 Bac. Abr., 343.

And if he be a common carrier, though there be no agreement of hire or rate settled, or promise of payment, yet he shall recover his hire *quantum meruit*, and therefore shall be liable for loss and damages.

Also, if a person, who is no common carrier, takes upon him to carry my goods, though I promise him no reward, yet, if my goods are lost or damaged by his default, I shall have an action against him.

For the very taking of the goods is a general consideration, though he be not a common carrier: and the acceptance of the goods makes him liable. Shaw, 104.

Delivery. A delivery to the carrier's servant, is a delivery to the carrier; if goods are delivered to a carrier's porter and lost, an action will lie against the carrier. Read, Car.

.. e. Liable for money. If a box is delivered generally to a carrier, and he accepts it, he is answerable, though the party did not tell him there is money in it, if the carrier asks, and the other says no, or if he accepts it conditionally, provided there is no money in it, in either of these cases the carrier is not liable. Str., 145.

If a man delivers a box to a carrier to carry, and he asks what is in it, and a man tells him a book and tobacco, (as the case was) and the truth there is one hundred pounds besides; yet, if the carrier is robbed, he shall answer for the money; for the other was not bound to tell him all the particulars in the box, and it was the business of the carrier to have made a special acceptance. Bac. Abr., 345.

May detain until hire paid.

E. 1 An. Skinner and Upshaw. The plaintiff brought an action of trover against the defendant, who was a common carrier, for goods delivered to him to carry. On not guilty pleaded, the defendant offered in evidence, that he offered to deliver the goods to the plaintiff and would pay him his hire; but that the plaintiff refused, and then he retained them. And it was ruled by Holt, chief justice, at Chancery Hall, (before whom the cause was tried) that a carrier may retain goods for his hire, and on direction, the defendant had a verdict against him. L. Raym., 752.

And even if the goods be stolen goods, yet the right owner shall not have them without paying for the carriage: for the carrier is not obliged to receive and carry the goods, the law will not deprive him of the remedy for the reward due for the carriage.—Ib., 166.

2d. Of Larceny of Goods, delivered to a Carrier.

It hath been holden, that a carrier embezzling goods, which he has received to carry to a certain place, is not guilty of felony, because there was not a felonious taking; but is liable only to a civil action. 1 Haw., 89, 90.

But it hath been resolved, that if a carrier open a pack, and take out part of the goods, with intent to steal it, he may be guilty of felony; ^{When felony} in which case it may be said, not only that such possession of a part distinct from the whole was gained by wrong, and not delivered by the owner; but also that it was obtained basely, fraudulently, and clandestinely, in hopes to prevent its being discovered at all, or fixed upon any one when discovered. 1 Haw., 90.

Also, it seems clear, that if a carrier, after he has brought the goods to the place appointed, take them away again, secretly, with intent to steal them, he is guilty of felony; because the possession which he received from the owner being determined, his second taking is in all respects the same as if he were a mere stranger. 1 Haw., 90.

Also, it hath been resolved, if goods be delivered to a carrier, to be carried to a certain place, and he carries them to another place, and disposes of them to his own use, that this is felony; because this declareth, that his intention originally was not to take the goods upon the agreement and contract of the party, but only with a design of stealing them. Kelynge, 82.

When goods are stolen from the carrier, he may prefer an indictment against the felon, as for his own goods; for though he has not the absolute property, yet he has such a possessory property, that he may maintain an action of trespass against any one who takes them from him, and so may indict a thief for taking them; and the indictment were good also if it had been brought by the real owner. Kelynge, 39. ^{Stolen by another.}

And there is a special case, wherein it is said, that a man may commit larceny by stealing his own goods, delivered to the carriers, ^{By owner.} with intent to make him answer for them; for the carrier had a special kind of property in the goods, in respect whereof, if a stranger had stolen them, he might have been indicted generally, as having stolen the said carrier's goods; and the injury is altogether as great, and the fraud as base, when they are taken away by the very owner. 1 Haw., 94.

CATTLE.

1st. Of stealing.

Any person who shall be convicted of stealing any bull, cow, ox, steer or calf, shall pay 10*l.* for each and every bull, cow, &c., for stealing of which he may be convicted; and if not able to pay said fine, he shall be publicly whipped, not exceeding thirty-nine stripes on the bare back: and for the second offence, shall be publicly whipped, not exceeding fifty stripes, on the bare back. A. A., No. 1577.

The commissioners of the markets in Charleston, are, required to compel butchers and others, to produce to the clerks of the markets in Charleston, the hides and ears of all neat cattle, of whatsoever description or age, brought for sale to the said markets; the said ears to be immediately destroyed by the clerk, to whom they may be produced, who shall be entitled to demand and receive from all butchers and others, bringing the same to market, the sum of four cents, as a compensation for his keeping a regular account, in a book, of the brands and marks of such cattle, and of the names of the parties producing them. Any butcher, or other person, who shall neglect, or refuse to comply with the terms prescribed by this act, shall forfeit and pay the sum of ten dollars for every such offence, to be recovered in a summary manner, before the court of wardens, in the said city, to be applied by them to the use and benefit of the orphan-house in the same. A. A., 1796.

If any person shall be found guilty of stealing any sheep, goats or hogs, he shall pay 5*l.* for each sheep, &c., so stolen; and for non-payment be publicly whipped, not exceeding thirty-nine stripes, on the bare back; and for the second offence, he shall be whipped publicly, not exceeding fifty stripes on the bare back.—Ib.

2d. Of killing, maiming, disfiguring, marking, &c.

Killing in
night.

By the 22 and 23 C. 2, c. 7; if any person shall, in the night time, maliciously, unlawfully, and willingly kill or destroy any horses, sheep, or other cattle, he shall be guilty of felony, but without corruption of blood, or loss of dower, and may be transported to avoid execution.

Maiming.

And if any person shall, in the night time, maliciously, unlawfully, and willingly maim, wound, or otherwise hurt any horses, sheep, or other cattle, whereby the same shall not be killed, or utterly destroyed, he shall forfeit treble damages by action of trespass, or upon the case.

And three justices [1 Q.] may inquire by a jury and witnesses; ^{Three justices.} and may issue warrants for summoning jurors; and for apprehending persons suspected, and take their examinations; and cause witnesses to come before them to give information on oath, so as no person to be examined, shall be proceeded against for any offence concerning which he is examined as a witness, and shall make a true discovery; and if such witness, being summoned, refuse to appear, they may submit him to be examined on oath.

If any person shall be convicted of wilfully and knowingly marking, ^{Disfiguring.} branding, or disfiguring any horse, mare, gelding, colt, filley, ass, mule, bull, cow, steer, ox or calf, of any other person, he shall for each horse, mare, &c., of which he shall or may be convicted of branding or disfiguring as aforesaid, pay £20, and on non-payment, be publicly whipped, not exceeding thirty nine stripes, on the bare back; and for a second offence, he shall pay £40, and on non-payment, be whipped, not exceeding fifty stripes, on the bare back. A. A., No. 1577.

If any person shall be convicted of wilfully and knowingly marking, branding or disfiguring any sheep, goat or hog, belonging to any other person, he shall, for each and every sheep, &c. so branded or disfigured, pay £5, and on non-payment, be publicly whipped, not exceeding thirty-nine stripes, on the bare back; and for the second offence, shall pay £10 for each sheep so killed, branded or disfigured; and in case of non-payment, be publicly whipped, not exceeding fifty stripes, on the bare back.—Ib.

No slave shall brand or mark any horse, mare, gelding, colt, filley, ^{By slaves.} ass, mule, bull, cow, steer, ox, calf, sheep, goat or hog, but in the presence, and by the direction of some white person, under the penalty of being whipped, not exceeding fifty stripes, by order of any one or more of the justices of the peace of the county, or parish, before whom such offence shall be proved, by the evidence of any white person, or slave.—Ib.

All witnesses duly subpoenaed, or bound over in recognizance to ^{Witnesses.} give evidence against any of the offenders aforesaid, and who do attend, shall be entitled to the same allowance as witnesses attending the common pleas: which said allowance shall be defrayed out of the above fines; and in defect thereof, out of any other fines that may be in the hands of the clerk, where such offenders are tried.—Ib.

3d. Of damage by or to.

If a man find the beasts of a stranger wandering in his grounds, ^{Wandering in one's grounds.}

doing him hurt or damage, he may distrain them until satisfaction be made him of the injury he has thereby sustained. 3 B. C., 7.

And by the Act of 1627, 6th S. L., 332, if any horses, mules, cattle, hogs, sheep or goats, shall break in to any field, enclosed with a lawful fence, according to the provisions of the said act, in which shall be growing or ungathered any grain, cotton, or vegetable production, raised for market or domestic consumption, it shall be lawful for the owner of said field, to seize such horses, mules, &c., and to keep them confined, until he shall have notified, within twenty-four hours after such seizure, the owner, or his or her agent, or overseer, who shall be bound to the owner of such field, fifty cents per head for every horse or mule, and twenty-five cents per head for cattle, &c., before he or she shall be entitled to have the same delivered up to him or her; and for a second breaking within one month, the owner shall be liable to all damages sustained by the person injured, in addition to the fine aforesaid, to be recovered by action of trespass in the Court of Common Pleas; and in every such case the plaintiff shall be entitled to full costs, if the verdict or decree shall exceed four dollars.

If any person, whose fields are not enclosed by a lawful fence, shall kill, wound, maim, chase, worry, or in any manner injure any horses, &c., which shall be found in such field, whether cultivated or not, or shall cause, or procure the same to be done by any other person, whether a slave or a freeman, such person, so offending, shall be liable to an action of trespass; and the plaintiff shall recover full satisfaction for the injury, with costs, if the verdict exceed four dollars. 6th S. L., 332.

If any slave shall kill, maim, wound, or injure any horse, mule, &c., not belonging to his owner, in any cultivated or uncultivated field, not enclosed by a lawful fence, he or she shall be liable to be apprehended; and on conviction by a magistrate and two freeholders, shall be punished by whipping, not exceeding thirty-nine lashes.—1b.

CAUSES, SMALL AND MEAN.

- 1st. OF THE EXTENT OF MAGISTRATE'S JURISDICTION IN.
- 2d. OF THE SUMMONS.
- 3d. OF COMPELLING THE ATTENDANCE OF WITNESSES, AND TAKING TESTIMONY OUT OF COURT.
- 4th. OF THE TESTIMONY AND TRIAL.
- 5th. OF THE JUDGEMENT AND EXECUTION.

1st. Of the Magistrate's jurisdiction.

The jurisdiction of magistrates in civil causes, is limited to twenty dollars; and to matters of debt, arising on contract, Act 1837, p. 17, ^{Limited to \$20.} (except in the parishes of St. Philips and St. Michaels, where they have also jurisdiction in cases of trover and detinue, where the damages claimed, or the amount in issue, does not exceed \$20.) It hath been held, however, that a plaintiff may charge less than an article or services rendered are worth, and sue for such charge before a magistrate; Goldthwaite vs. Dent, 3 M'C., 296. So also in trover; he may sue for less than the value of the article converted; Huff vs. Hoff, 1 Bail., 456. But he may not give up a portion of principal or interest of a debt due by note or otherwise, for the purpose of giving jurisdiction; Amand vs. Gery, 2 N. & M., 487. But a party may ^{Exceptions.} bring separate actions on two notes, or a note, and open account, although the two united would exceed the jurisdiction of the Court; Parrot vs. Green, 1 M'C., 531. ^{May bring separate actions.}

In all cases of contract to the amount of \$20, the jurisdiction of a magistrate is exclusive; Allen vs. Singleton, Rice, 290. The jurisdiction of a magistrate does not extend to penalties, except by express ^{Not to penalties.} words of the statute creating the penalty. Anderson vs. Fowler, 1 Hill, 226.

2d. Of the Summons.

The summons of the magistrate must be under his hand and seal, ^{its requisites.} together with a copy thereof, (except in St. Philips and St. Michaels, where the original is left at the residence of defendant,) directed to any constable; must express plainly the names of the parties, the time and place of appearing, together with the nature of the demand; and if it be on contract, a precise copy of the note, bond, book, account, or other demand set up, shall be indorsed or annexed thereto. Act 1837, p. 17.

LAW OF MAGISTRATES.

Form of Summons.

STATE OF SOUTH CAROLINA. }
 District. }

By A. B., Esq., magistrate, in and for the said State.

To any lawful Constable.

Complaint having been made unto me by C. D., that E. F. indebted to in the sum of dollars, cents, on a (no or account, &c.,) a copy whereof is hereto annexed. These are therefore, to require you to summon the said E. F. to appear before me, at on next, the day of at o'clock, M., to answer the said complaint.

Given under my hand and seal, at the day of A D., one thousand eight hundred and

[L. s.]

Statement:

Debt, \$

Interest,

Costs.

Of the service.

The service must be by a lawful constable, by delivering to the defendant a copy of such summons, or leaving it at his usual place of residence, at least five days before the trial; and the return should be by the constable on oath, or the written acknowledgement of the defendant, that he has been duly notified. The five days notice may be dispensed with, if the plaintiff make oath that he is apprehensive of losing his debt by such delay; a record whereof must be made to the magistrate; and in such case the summons may be served and returned as the magistrate may direct. Act 1839, p. 17.

3. *Procuring the attendance of Witnesses, or taking Testimony of Court.*

Any magistrate, on the application of either plaintiff or defendant in a cause pending before him, is required to issue a summons, citing any person whose testimony may be required in such cause, to appear before him at a certain time and place, not more than twenty miles from the residence of such witness, to give evidence; which summons shall be served personally, at least three days before such attendance is required; and if such person shall neglect or refuse to attend, the magistrate shall have power to issue a rule, commanding such witness to be brought before him; or if any witness attending, refuse to give evidence without good cause shewn, the magistrate may commit him to the jail of the district for a contempt, not longer than one day, &c.

By summons

Served personally.

By rule.

well as fine him, in an amount not exceeding ten dollars; the costs of such rule, commitment and detention in custody, as well as the fine so imposed, may be levied of the goods and chattels of such recusant witness, on the order of such magistrate, directed to any constable of the district, as in cases of execution. Commitment and fine.

If the attendance of a material witness cannot be had by reason of extreme age, sickness or infirmity, or of indispensable absence on public official duty, or consequence of intended removal from the State, before the case can be ready for trial, or where such witness may be resident in another district, or without the limits of the State, the magistrate before whom the cause is pending may take the examination of such witness in writing, or cause the same to be taken by another magistrate. In case of age, &c. Examination taken in writing. Parties to have notice. *Provided*, that the parties to such cause shall have notice of the time and place of such examination in time to be present. *Provided also*, that when such examination is made by another, it shall be sealed up with the title of the case indorsed, and conveyed by a disinterested person to the magistrate authorizing the same.—Act 1839, p. 20, sec. 19.

4th. *The Testimony and Trial.*

[See also title EVIDENCE.]

If the summons be returned duly served, and the defendant make default, or appearing no good cause for continuance to be shewn, the magistrate may proceed to hear the testimony, and determine the case. The plaintiff may either establish his claim by the testimony of competent witnesses, or by his own oath, when in law he is a competent witness; or in case a witness cannot be produced to prove such demand, or any matter or thing pertaining thereto, the magistrate may examine the defendant on oath; and in case he refuse to take the oath, or to answer such question as shall be demanded of him by the magistrate, then the plaintiff may be examined. If the defendant set up a discount, the rule shall be reversed as to the right of being first sworn. Plaintiff's oath, when. Rule in discount. Act 1839, sec. 15.

5th. *The Judgement and Execution.*

If the plaintiff discontinue or be non-suited, or the complaint be disproved, the magistrate shall award proper costs against such plaintiff; but if the demand or any part thereof be sustained, he shall give judgement therefor, together with the costs, and having entered the same in his book, may issue execution for such amount so adjudged, which execution may be levied of the goods and chattels of the defendant, wherever these may be found within the State, at any time Against plaintiff.

Against defendant. within one year* from the date thereof, and not afterward, but on it being returned, not satisfied with the cause thereof; it may be renewed at any time within four years, by giving five days notice to the defendant; and in like manner a third execution may be sued out, if the second be not satisfied.—Ib. (*See APPEAL.*)

Execution. Let it be observed, that the act limits the execution to the goods and chattels of defendants, so that land cannot be levied under such execution, and it has been held, that in no case may a magistrate

May not take lands. issue execution against the body.—Cheves R., 235.

Nor the body. The execution may be sued out at any time, within a year and a day after judgement, and a new action cannot be brought upon the judgement within that period. *Lee vs. Giles*, 1 Bail., 449.

Form of an Execution after judgement is pronounced for the Plaintiff.

District. } ss.

By I. P., one of the justices assigned to keep the peace in and for the district aforesaid.

To any lawful Constable of the District aforesaid.

These are in the name of the State to charge and command you, that on the goods and chattels of E. D., of the district aforesaid, shoemaker, you levy, or cause to be levied, the sum of , which hath been by me adjudged to A. P., of said district, yeoman, for a debt; as also the sum of , for his the said A. P.'s costs and charges, expended in and about the recovery thereof; whereof the said E. D. is convict, according to the Act of Assembly in that case made and provided. Given under my hand and seal, the day of in the year

I. P. [L. s.]

Form of an execution against the plaintiff, when non-suited, or judgement shall pass against him.

District. } ss.

By I. P., one of the justices assigned to keep the peace in and for the district aforesaid.

To any lawful Constable of the said district.

These are to charge and command you, that on the goods and chattels of A. B., of the district aforesaid, planter, you levy or cause to be levied, the sum of , which hath been by me adjudged to C. D., of the said district, shoemaker, for his costs in defending an action for a debt brought against him by the said A. P.; and in which action

*By Act of 1847, 433, changed to four years.

be the said A. P., hath been non-suited, according to the Act of Assembly in that case made and provided. Given under my hand and seal, the day of , in the year

Notice of Renewal.

A. B. }
 vs. } Execution. Dated day of 184
 C. D. }

Whereas it appears to me by the return of E. F., constable, that the said execution hath not been satisfied, but remains unpaid; you, the said defendant, are hereby notified to appear before me at on the day of at o'clock, to shew cause, if any, why an alias execution should not issue in said case.

Dated day of 18

G. H.

Magistrate.

C H A L L E N G E .

[See DUELLING.]

C H A M P E R T Y .

Campi, partitio, or the dividing of the field. It signifies a maintenance of any man in his suit depending, on condition of receiving part of the things when they are recovered. It seems to have been an ancient grievance, and is a very high offence at common law, to buy or sell any doubtful title to lands known to be disputed, in order that the purchaser may carry on the suit. It does not seem to be material, whether the title thus sold be good or bad, or whether the seller were in possession or not, unless his possession were lawful and uncontested; for all practices of this kind are to be discountenanced as manifestly tending to oppression, by giving opportunities to great men to purchase the disputed titles of others, to the great grievance of the adverse parties, who may be often unable or discouraged to defend their titles against such powerful persons, which perhaps they might safely maintain against their proper adversary. 1 Haw., 267.

2d. Its Punishment.

The punishment of Champerty is by fine and imprisonment: and

by Stat. 32 H. 8, c. 9, in case of buying pretended title to lands, a forfeiture of the full value of the land. The prosecution under said statute is limited to one year after the offence.

C H E A T S .

Cheats are either at common law or by statute. Those at common law, are 1st, frauds relative to matters of public concern; as doing judicial acts in the name of another, supplying prisoners of war with unwholesome food; and relates solely to the affairs of government. 2d. Such as regard private concerns, which are effected by means of conspiracy, forgery, or false tokens, calculated to deceive the public in general. *State vs. Wilson*, 2 M. C. R., 145.

It seemeth to be the better opinion, that the deceitful receiving of money from one man, to another's use, upon a false pretence of having a message and order to that purpose, is not punishable by a criminal prosecution, because it is accompanied with no manner of artful contrivance, but wholly depends on a bare naked lie; and it is said to be needless to provide severe laws for such mischiefs, against which common prudence and caution may be a sufficient security. 1 Haw., 188.

A person, for a counterfeit pass, was adjudged to the pillory, and fined. *Dalt.*, c. 32.

On an indictment against the defendant, a miller, for changing corn delivered him to be ground, and giving bad corn instead of it, it was moved to quash the same, because it was only a private cheat, and not of a public nature. It was answered, that being a cheat in the way of trade, it concerned the public, and therefore was indictable. And the Court was unanimously agreed not to quash it. *T. 16, G. 2, K, and Wood. Sess. c. v. 1.*

A person falsely pretending that he had power to discharge soldiers, took money of a soldier to discharge him; and being indicted for the same, the Court held the indictment to be good. *T. 3, c. Serlestead's case. 1 Latch., 202.*

As there are frauds which may be relieved civilly, and not punished criminally (with the complaints whereof the courts of equity do generally abound,) so there are other frauds, which, in a special case, may not be helped civilly, and yet shall be punished criminally: thus, if a minor goes about the town, and pretending to be of age, defrauds

Minors.

many persons by taking credit for considerable quantities of goods, and then insists on his non-age; the persons injured cannot recover the value of their goods, but they may indict and punish him for a common cheat. *Barl.*, 100.

Finally, the distinction, which, as it seemeth, will solve almost all cases of this kind, was taken in the case of *K. and Wheatley*, H. 1, G. 3. The defendant was indicted and convicted for selling beer short of the due and just measure, to wit, sixteen gallons as and for eighteen. It was moved in arrest of judgement; and by the Court, this is only an inconvenience and injury to a private person, arising from that private person's own negligence and carelessness, in not measuring the liquor upon receiving it, to see whether it held out the just measure or not. Offences that are indictable, must be such as affect the public; as if a man uses false weights and measures, and sells by them to all, or to many of his customers, or uses them in the general course of his dealing: so if there is a conspiracy to cheat; for these are deceptions that common care and prudence are not sufficient to guard against. These are much more than private injuries: they are public offences. But in the present case, it is a mere private imposition or deception; no false weights or measures are used; no conspiracy; only an imposition upon the person he was dealing with, in delivering him a less quantity instead of a greater, which the other carelessly accepted. It is only a non-performance of his contract; for which non-performance he may bring his action. So the selling an unsound horse for a sound one, is not indictable: the buyer should be more upon his guard. And the distinction which was laid down as proper to be attended to in all cases of this kind, is this: that in such impositions or deceits, where common prudence may guard persons against their suffering from them, the offence is not indictable, but the party is left to his civil remedy for the redress of the injury that has been done to him; but where false weights and measures are used, or false tokens produced, or such methods taken to cheat and deceive, as people cannot, by any ordinary care or prudence, be guarded against, there, it is an offence indictable. *Burr. Reports*, 1125.

2d. By Statute.

By the 33 H. 8, c. 1; if any person shall falsely and deceitfully obtain, or get into his hands or possession any money, goods, chattels, jewels, or other things, of any other person, by colour and means of any false privy token, or counterfeit letter, made in another man's

name, and shall be convicted thereof, by examination of witnesses, or confession at the Sessions, or by action in any Court of record, he shall have such punishment, by imprisonment, pillory, or other corporal pain (except death) as the Court shall appoint : saving to the party grieved such remedy, by action or otherwise, for the goods so obtained, as he might have had by common law.

Not unless
token be
used.

On motion to quash an indictment, which was, that the defendant came, pretending that such a person had sent him to receive £20, and received it, whereas such person did not send him : by the Court ; it is not indictable, unless he came with false tokens ; for we are not to indict one man for making a fool of another. *Blackerby*, 79.

H. 13, G. 2, and Munoz. It was adjudged, that an indictment averring the offence to be by false tokens, without showing what those false tokens are, is not sufficient; and that the fraudulent procuring a note from a person, by falsely affirming that there was one in the next room that would pay the money due upon it, whereas in fact there was no such person in the next room, is not a false token, but a false affirmation only. *Sess. c. v., 201. Str., 1129.*

By cunning,
etc.

By Act of 1791, 1 Faust, 78, it is enacted, that if any person shall overreach, cheat, or defraud, by any other cunning, swindling garb or devices, so that the ignorant or unwary, who are deluded thereby, lose their money or other property, every such person exercising such infamous practices, shall, on conviction thereof in any Court of this State, exercising criminal jurisdiction by trial by jury, be deemed guilty of enticing, inveigling, defrauding and swindling, and shall forfeit a sum at the discretion of the Court and jury, besides refunding to the party aggrieved double the sum he was defrauded of. Under which State statute it hath been held, that, obtaining property from an ignorant person by threats of a prosecution for stealing, or by threats of his life, constitutes the offence of swindling. *State vs. Vaughan and Halcolm*, 1 Bay, 282.

By threats.

But that selling a blind horse as sound, or a free girl as a slave, are not within the statute. *State vs. Delyon*, 1 Bay, 353; and *State vs. Wilson*, 2 M. C. R., 135.

3d. *Precedents.*

1st. *Warrant to apprehend a cheat.*

District. } *ss.*

To all and singular the Constables, and other peace officers of the districts aforesaid.

Whereas complaint hath been made unto me, A. B., magistrate for the said district, upon the oaths of A. I., of yeoman, and B. I., of yeoman, that on the day of A. O., of yeoman, did, by a false privy token, [or counterfeit letter] that is to say, by [here particularize the offence] falsely and deceitfully obtain, and get into his hands and possession [here mention the things] from C. I., of contrary to the statute in that case made: these are therefore to command you, upon sight hereof, forthwith to bring the said A. O. before me, at on the day of to answer to the said complaint, and farther to be dealt withal according to law. Given under my hand and seal, the day of in the year

A. B. [L. s.]

Let an affidavit, setting forth at large the particulars of the charge, be attached to the warrant.

2d. Commitment for a cheat.

District. } *ss.*

By A. B., magistrate in and for the district aforesaid.

To all and singular the Constables, and other peace officers of the district of and to the keeper of the common jail of

Whereas A. O., late of in the district of yeoman, hath been charged, upon oath, before me, with having falsely and deceitfully obtained, and got into his hands and possession, [here mention the things] from C. I., of in the district aforesaid, by means of a false privy token, contrary to the statute in that case made and provided: these are, therefore to command you, forthwith to convey and deliver into the custody of the said keeper of the said jail, the body of A. O., charged before me with [here specify the offence.] And you, the said keeper, are hereby required to receive the said A. O. into your custody, in the said jail, and him there safely keep, &c. Given under my hand and seal, the day of in the year

A. B. [L. s.]

CITIZENSHIP.

[See ALIEN.]

C H U R C H .

[See BURGLARY.]

C O I N .

By the constitution of the United States, sec. 8, c. 5, (shall have power to coin money, regulate the value thereof foreign coin; also to provide for the punishment of counterfeit securities and current coin of the United States. And by sec. 1, no State shall coin money, issue bills of credit, or make a but gold and silver coin, a tender in payment of debts.

1st. Of the coin of the United States.

By Act of Congress, 1837, 4 Story, 2523, sec. 8th, the st
 Of the alloy. gold and silver of the United States is required to be such, th
 thousand parts by weight, nine hundred shall be of pure m
 one hundred of alloy. And the alloy of silver coins shall b
 per; and the alloy of the gold coins shall be of silver and
 provided that the silver do not exceed one half of the whole

Of the silver coin. Sec. 9. That of the silver coins, the dollars shall be of th
 of four hundred and twelve and one half grains, and in like p
 of the parts of dollars; and shall be a legal tender, accordin
 nominal value, for any sums whatever.

Gold coin. Sec. 10. Of the gold coins, the weight of the eagle sha
 hundred and fifty-eight grains, and the weight of the half an
 in like proportion; and for all sums whatever, shall be a leg
 the eagle for ten dollars, the half for five, and the quarter for
 a half dollars.

All gold coins of the United States, coined anterior to Ju
 are required to be received in all payments, at the rate of n
 and eight tenths of a cent per penny-weight.

Of the copper coin. Of the copper coin; the weight of the cent shall be one
 and sixty-eight grains; and the weight of the half cent ei
 grains; Act 1807, 4th Story, 2524. The copper coin is
 made a legal tender.

2d. Of Foreign Coin.

The following silver coins shall be of legal value, and s

current as money within the United States by weight, for the payment of all debts and demands, at the rate of one hundred cents the dollar. That is to say, the dollars of Mexico, and Peru, Chili and Central silver. America, of not less weight than four hundred and fifteen grains each, and those re-stamped in Brazil, of like weight, of not less fineness than ten ounces, fifteen pennyweights of pure silver in the troy pound of twelve ounces of standard silver, and the five franc pieces of France, &c., at ninety-three cents each. Act 1834, 4th Story, 2373.

The following gold coins shall pass current, and be receivable in all payments by weight, at the rates following, to-wit: the gold coins of ^{Gold coin by weight.} Great Britain, Portugal, and Brazil, of not less than twenty-two carats fine, at the rate of ninety-four cents and eight tenths of a cent. per pennyweight; the gold coins of France, nine tenths fine, at the rate of ninety-three cents, and one tenth of a cent. per pennyweight, and those of Spain, Mexico, and Colombia, of the fineness of twenty-three carats, three grains and seven sixteenths of a grain, at the rate of eighty-nine cents and nine-tenths of a cent. per pennyweight.

By Act of Assembly, 4th S. L., 543, gold and silver coins, of the following weights and denominations, shall pass current, and be received in payment, as a tender in law, in this State, at the following value of four shillings and eight-pence sterling to a Spanish milled dollar, and at the following relative value to each other: that is to say,

	Weight.	dwt.	grs.	l.	s.	d.	dollars.
A Spanish milled dollar	4s. 8d.						
Johannes, - - - -	18	0		3	14	8	16
Half ditto, - - - -	9	0		1	17	4	8
Quarter ditto, - - - -	4	12		0	18	8	4
Eighth ditto, - - - -	2	6		0	9	4	2
Moidore, - - - -	6	16		1	8	0	6
Half ditto, - - - -	3	8		0	14	0	3
Quarter ditto, - - - -	1	16		0	7	0	1½
Eighth Moidore, - - - -	0	20		0	3	6	0½
Spanish doubloon, - - - -	17	0		3	10	0	15
Double pistole, - - - -	8	12		1	15	0	7½
Pistole, - - - -	4	6		0	17	6	3½
Half pistole, - - - -	2	3		0	8	9	1½
English guinea, - - - -	5	7		1	1	9	4½
Half ditto, - - - -	2	15		0	10	10½	2½
Quarter ditto, - - - -	1	7		0	5	5½	1 1.6
French guinea, - - - -	5	5		1	1	5	4½ & 5d.
French crown of 4 to the Louis d'or, - - - -	0	0		0	5	0	1 1-14
English crown, - - - -	0	0		0	5	0	1 1-14
Pistareen, - - - -	0	0		0	0	11	
German piece, - - - -	6	6		1	3	4	5
Half ditto, - - - -	3	3		0	11	8	2½
Ducat, - - - -	2	5		0	9	4	2

A. A. No. 1276.

This table is of force, except those parts which conflict with the above Acts of Congress.

3d. Offences relating to.

Counterfeiting. Any person who shall counterfeit, or utter, or attempt to pass, knowing them to be counterfeit, any of the aforesaid gold or silver coins, or shall make and keep in his or her possession, any stamp, dye, or mould for coining the same, upon being duly convicted thereof, shall be adjudged guilty of felony, and suffer death as a felon, without benefit of clergy. (By Act of 1845, this punishment is changed to whipping, imprisonment and fine.)

Clipping. If any person shall wilfully clip, file, or otherwise diminish the weight or value of any of the gold or silver coin, passing by authority of the General Assembly within this State, or shall cause the same to be clipped, filed or diminished, he shall, on conviction thereof, before the justices of any of the Courts of general sessions within this State, suffer, for every offence, twelve months close imprisonment, and during that period shall stand twice in the pillory, for one hour each time. A. A., 1408.

In the case of the State vs. Antonio, 2d Tr. C. R., 776; it was decided that the State may punish offences against the current coin, and such punishment may be different from that affixed for such offence by Act of Congress; but it seems to be conceded that the coinage of the United States is not included in any of the Acts of Assembly, and for offences against such coin, the party must be indicted under the Acts of Congress.

Counterfeiting gold or silver coin. By Act of Congress, 1825, 3d Story 2005, sec. 20; if any person or persons shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly aid or assist in falsely making, forging, or counterfeiting any coin, in the resemblance or similitude of the gold or silver coin, which has been, or hereafter may be coined at the mint of the United States, or in the resemblance or similitude of any foreign gold or silver coin, which by law now is, or hereafter may be made current in the United States; or shall pass, utter, publish, or sell, or attempt to pass, utter, publish or sell, or bring into the United States from any foreign place, with intent to pass, utter, publish, or sell, as true, any such false, forged or counterfeited coin, knowing the same to be false, forged, or counterfeited, with intent to defraud any body politic, or corporate, or any other person or persons whatsoever; every person so offending, shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine, not exceeding five thousand dollars, and by imprisonment, and confinement to hard labor, not exceeding ten years, according to the aggravation of the offence.

Or utter, or pass.

Punished by fine, etc.

If any person or persons shall falsely make, forge, or counterfeit, or cause, or procure to be falsely made, forged, or counterfeited, or willingly aid, or assist in falsely making, forging, or counterfeiting any coin, in the resemblance or similitude of any copper coin, which Copper coin. has been, or hereafter may be coined at the mint of the United States; or shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or bring into the United States, from any foreign place, with intent to pass, utter, publish, or sell, as true, any such false, forged or counterfeited coin, with intent to defraud any body politic, or corporate, or any other person or persons whatsoever; every person so Punished by fine, etc. offending, shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine, not exceeding one thousand dollars, and by imprisonment, and confinement to hard labor, not exceeding three years.

If any of the gold or silver coins which shall be struck or coined at the mint of the United States, shall be debased, or made worse, as Debasement. to the proportion of fine gold, or fine silver, contained therein, or shall be of less weight or value than the same ought to be, pursuant to the several acts relative thereto, through the default, or with the connivance of any of the officers, or persons who shall be employed at the said mint, for the purpose of profit or gain, or otherwise, with a fraudulent intent; and if any of the said officers or persons shall embezzle any of the metals which shall, at any time, be committed to their charge for the purpose of being coined, or any of the coins which shall be struck or coined at the said mint, every such officer or person, who shall commit any or either of the said offences, shall be deemed guilty of felony, and shall be sentenced to imprisonment and hard Imprisonment and labour. labor, for a term not less than one year; and shall be fined in a sum not exceeding ten thousand dollars.

COMMITMENT.

Since the *habeas corpus act*, a commitment in writing seems more necessary than it was in former times; otherwise the prisoner may be admitted to bail upon that act, whatsoever his offence may have been.

When a statute appoints imprisonment, but limits no time when, it is to be understood that he shall be imprisoned presently. Dalt., c. 170.

- 1st. WHO MAY BE COMMITTED.
- 2d. TO WHAT PLACE.
- 3d. THE FORM OF THE COMMITMENT.
- 4th. THAT THE JAILOR SHALL RECEIVE THE PRISONER.
- 5th. SHALL CERTIFY THE COMMITMENT.
- 6th. COMMITMENT DISCHARGED.

1st. Who may be Committed.

Persons not
bailable.

There is no doubt but that persons apprehended for offences which are not bailable, and also all persons who neglect to offer bail for offences which are bailable, must be committed. 2 Haw., 116.

And it is said, that whosoever a justice is empowered by any statute to bind a person over, or to cause him to do a certain thing, and such person being in his presence, shall refuse to be bound, or to do such thing, the justice may commit him to jail, to remain there till he shall comply. 2 Haw., 116.

If a prisoner be brought before a justice, expressly charged with felony upon oath, the justice cannot discharge him, but must bail or commit him. 2 H. H., 121.

But if he be charged with suspicion only of felony, yet if there be no felony at all proved to be committed, or if the fact charged as a felony, be in truth no felony in point of law, the justice may discharge him; as if a man be charged with felony for stealing a parcel of the freehold, or for carrying away what was delivered to him, and such like, for which, though there may be cause to bind him over as for a trespass, the justice may discharge him as to felony, because it is not felony. But if a man be killed by another, though it be by misadventure or self-defence, (which is not properly felony) or in making an assault upon a minister of justice in execution of his office (which is not at all felony) yet the justice ought not to discharge him; for he must undergo his trial for it; and therefore he must be committed, or at least bailed. 2 H. H., 121.

2d. To what place.

All felons shall be committed to the common jail, and not elsewhere. Generally, if a man commit felony in one county, and be arrested for the same in another county, he shall be committed to jail in the county where he is taken. Dalt., c. 170.

Yet if he escapes, and is taken on fresh suit, in another county, he may be carried back to the county where he was first taken. Dalt., c. 170.

3d. *Form of the Commitment.*

It must be in writing, either in the name of the State, and only ^{In writing.} tested by the person who makes it, or it may be made by such person in his own name, expressing his office or authority, and must be directed to the jailor or keeper of the prison. 2 Haw., 119.

Yet the mention of the name and authority of the justice, (lord Hale says) in the beginning of the mittimus, is not always necessary, for the seal and subscription of the justice to the mittimus is sufficient ^{Name of justice and party.} warrant to the jailor; for it may be supplied by averment, that it was done by the justice. 2 H. H., 122.

It should contain the name and surname of the party committed, if known; if not known, then it may be sufficient to describe the person by his age, stature, complexion, colour of his hair, and the like, and to add that he refuseth to tell his name. 1 H. H., 577.

It is safe, but not necessary, to set forth that the party is charged upon oath. 2 Haw., 120.

It ought to contain the cause, as for treason, or felony, or suspicion ^{Cause.} thereof; otherwise if it contain no cause at all, if the prisoner escape, it is no offence at all; whereas if the mittimus contained the cause, the escape were treason, or felony, though he were not guilty of the offence; and therefore for the State's benefit, and that the prisoner may be the more safely kept, the mittimus ought to contain the cause. 2 Inst., 52; 1 Ed. 2, St. 2.

And hereupon it appeareth, that a warrant or mittimus, to answer to such things as shall be objected against him, is utterly against law. 2 Inst., 591.

Also it ought to contain the certainty of the cause; and therefore if it be for felony, it ought not to be generally for felony, but it must contain the special nature of the felony, briefly, as for felony for the death of such an one, or for burglary in breaking the house of such a one; and the reason is, because it may appear to the judges of the Court upon an *habeas corpus*, whether it be for felony or not. 2 H. H., 122.

But the want hereof seems not to make the commitment absolutely void, so as to subject the jailor to a false imprisonment; but it lies in averment to excuse the jailor or officer, that the matter was for felony. 1 H. H., 584.

It must have an apt conclusion; as if it is for felony, to detain him till he be thence delivered by law, or by order of law, or by due course of law. 2 Haw., 120; 2 H. H., 123. ^{Conclusion.}

But if the conclusion be irregular, it doth not seem to make the warrant void, but the law will reject that which is surplusage, and the rest shall stand; so that if the matter appear to be such, for which he is to remain in custody, or be bailed, he shall be bailed or committed, as the case requires, and not discharged, but the wrong conclusion shall be rejected. 1 H. H., 584.

Time. Where a statute appoints imprisonment, but limits no time how long, in such case the prisoner must remain at the discretion of the Court. Dalt., c. 170.

Seal. It must be under seal; and without this the commitment is unlawful, the jailor is liable to false imprisonment; and the wilful escape by the jailor, or breach of prison by the felon, makes no felony. 1 H. H., 583.

But this must not be intended of a commitment by the sessions, or other court of record; for there the record itself, or the memorial thereof, which may at any time be entered of record, is a sufficient warrant, without any warrant under seal. 1 H. H., 584.

Place. It should also set forth the place at which it is made, that it may appear to be within the jurisdiction of the justice. 2 Haw., 119.

Date. It must also have a certain date, of the year and day. 2 H. H., 12

4th. Jailor shall receive the Prisoner.

If he refuse. If the jailor shall refuse to receive a felon, or take any thing from receiving him, he shall be punished for the same by the justices at the next jail delivery. 4 Ed. 3, c. 10; Dalt., c. 170.

But if a man be committed for felony, and the jailor will not receive him, the person that arrested him may, in such case, keep the prisoner in his own house, as it seemeth. Dalt., c. 170.

But in other cases, it seems that regularly, no one can justify the detaining a prisoner in custody out of the common jail, unless there be some particular reason for so doing; as if the party be so dangerously sick, that it would apparently hazard his life to send him to the jail, or there be evident danger of a rescue from rebels, or the like. 2 Haw., 118.

5th. Shall certify the commitment.

By the 3 H. 7, c. 3; the sheriff or jailor shall certify the commitment to the next jail delivery.

6th. Commitment discharged.

Not if committed for crime done. It seems that a person legally committed for a crime, certainly appearing to have been done by some one or other, cannot be lawfully

discharged by any one but the State, till he be acquitted on his trial, or have an *ignoramus* found by the grand jury, or none to prosecute him on a proclamation for that purpose, by the justices of jail delivery. But if a person be committed on a bare suspicion, without an indictment for a supposed crime, where afterwards it appears that there was none, as for the murder of a person thought to be dead, who afterwards is found to be alive; it hath been holden, that he may be safely dismissed, without any farther proceeding, for that he who suffers him to escape, is properly punishable only as an accessary to his supposed offence; and it is impossible that there should be an accessary where there can be no principal; and it would be hard to punish one for a contempt, in disregarding a commitment founded on a suspicion, appearing in so uncontested a manner to be groundless. 2 Haw., 121.

But may, if
on suspicion.

Warrant of commitment.

District. } ss.

By I. P., Esquire, magistrate in and for the said district.

To A. B., Constable of the parish aforesaid, and to the keeper of the common jail in the district aforesaid.

These are to command you, forthwith to convey and deliver into the custody of the keeper of the said jail, the body of A. O., charged before me on the oath of A. C., with [here specify the offence.] And you, the said keeper, are hereby required to receive the said A. O. into your custody, in the said jail, and him there safely to keep until he be thence delivered by due course of law. Given under my hand and seal, the day of in the year

I. P. [L. s.]

COMPOUNDING.

The offence of compounding a felony, is, where a party robbed, not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute. It is said to have been anciently punishable as felony, but now only with fine and imprisonment, unless it be accompanied with some degree of maintenance given to the felon, which makes the party an accessary after the fact. The barely taking again one's own goods, which have been stolen,

Definition.

How punishable.

Taking one's goods.

is no offence at all, unless some favour be shewn to the thief. 1 Russel, 136.

Agreement
after conviction.

Held valid.

An agreement to put an end to a misdemeanor, has been considered to be illegal, as impeding the course of public justice; but it is sometimes done after conviction, with the sanction of the Court, in cases where the offence principally and more immediately affects an individual; the defendant being permitted to speak with the prosecutor before any judgement is pronounced, and a trivial punishment being inflicted if the prosecutor declares himself satisfied. And where, in a case of an indictment for ill-treating a parish apprentice, a security for the fair expenses of the prosecution had been given by the defendant after conviction, upon an understanding that the Court would abate the period of his imprisonment, the security was held to be good upon the ground that it was given with the sanction of the Court, and to be considered as part of the punishment suffered by the defendant in expiation of his offence, in addition to the imprisonment inflicted on him.

The compounding of information on penal Statutes is a misdemeanor against public justice, by contributing to make the laws odious to the people. 1 Russel, 135, 136.

CONFESS I O N .

[See EVIDENCE.]

CONSPIRACY.

What is.

Is the confederating of two or more persons, to injure a private person, or the interest of the public, or to do any unlawful act.

One person alone cannot be guilty of conspiracy; from whence it follows, that if all the defendants who are prosecuted for such a conspiracy be acquitted but one, the acquittal of the rest is the acquittal of that one also: and upon the same ground it hath been holden, that no such prosecution is maintainable against a husband and wife, only because they are esteemed but as one person in law: but it is certain that an action on the case, in the nature of a conspiracy, may be brought against one only: also it hath been resolved, that if such as

action be brought against several persons, and all but one be acquitted, yet judgement may be given against that one only. 1 Haw., 192.

All confederacies, wrongfully to prejudice another, are misdemeanors at common law, whether the intent be to injure his person, his property, or his character; as a conspiracy to indict an innocent man of felony, falsely and maliciously, and this, though the indictment be insufficient, or the Court before which it was taken had no jurisdiction to try the offence; 1 Haw., c. 72, sec. 3. Conspiring to marry a girl to get her fortune, is an indictable offence; 3 Ves., and B., 173. So is a conspiracy to marry under a feigned name, for the purpose of setting up a fictitious claim to an estate, though no one is, in reality, injured; Leach., 39. An indictment lies for conspiring to cheat or defraud another. 2 B. and A., 204.

There are many cases in which the act would not be cognizable at law, which become the subject of indictment, when effected by several with a joint design. The verbal slander of another is not indictable, but it is so where several unite in a scheme to injure his character; 1 Lev. 6, 2. Each person attending a theatre has a right to express his disapprobation of a piece, or a performer; but if several previously agree to condemn a play, or hiss an actor, they will be guilty of conspiring. 2 Camp., 358.

The offence of conspiracy is not confined to the prejudicing a particular individual; it may be to injure public trade, to affect public health, to violate public policy, to insult public justice, or to do any act, in itself, illegal.

A conspiracy to prevent a prosecution for a felony, is an indictable offence; 14 Ves., 165. So is a conspiracy to effect a restraint of trade. 13 East., 230.

A combination of workmen to raise their wages, of wine merchants to sell pernicious liquor, of parish officers to marry paupers; and of any persons to procure the release of prisoners by fictitious bail, is indictable as a conspiracy. 8 Mod. 3 Ld. Bay, 1179. 6 East., 133. 4 Bur., 2106.

A combination between private individuals to support each other in all undertakings, lawful or otherwise, is illegal. 9 Co. 56.

In every case of conspiracy, the defence depends on the unlawful agreement, and not on the act which follows it; the latter is but evidence of the former; 2 Bur., 953. And it is not necessary to constitute the offence, that any act should be done in pursuance of the agreement, or that any party was actually injured. 8 Mod., 321, 1 Leach, 39.

LAW OF MAGISTRATES.

The punishment. —Conspirators may be indicted at the suit of the State, and were, by the ancient common law, to receive the villenous judgement; but it is now the better opinion, that the villenous judgement, is, by long disuse, become obsolete, it not having been pronounced for ages, but instead thereof, the delinquents are usually sentenced to fine, imprisonment, and pillory. 4 B. C., 137.

But though the villenous judgement be obsolete, yet one of the incidents thereto, namely, incompetency as a juror or witness, is consequent upon conviction of conspiracy to accuse another of felony.—Ib.

*Precedents.**Affidavit.*

STATE OF SOUTH-CAROLINA, }
District. }

Personally appeared before me, C. D., (full name) who being duly sworn, deposes and says, that E. F. and G. H., did on the day of A. D. at in the district and State aforesaid, unlawfully confederate and conspire together to injure (this deponent, or the public, as the case may be.) [Here state specially the matter of confederacy,] and the acts (if any) done in pursuance thereof.

Sworn to before me this day of 18

C. D.

B. C.

Magistrate.

Warrant.

STATE OF SOUTH-CAROLINA, }
District. }

By A. B., magistrate, in and for the district and State aforesaid.

To any lawful Constable.

Whereas complaint upon oath has been made before me by C. D., that E. F. and G. H., (the initials will not suffice, always give the names in full) did on the day of , at in the district and State aforesaid, unlawfully confederate and conspire together to injure the said deponent, by &c.

These are therefore to command you, forthwith, to arrest the said E. F. and G. H., and bring them before me, to be dealt with according to law. Given under my hand and seal, this day of

A. B. [L. s.]
Magistrate.

CONSTABLES.

1st. Who shall not be a Constable.

Justices of the peace, clergymen, attornies, infants, lawyers, madmen, physicians, idiots, poor, old, and sick persons, are exempted from serving as constables. Cro. Car., 389. Noy, 112, 113.

Any person being appointed a constable, may, with leave of the Court of General Sessions, be exempted, upon his finding some person to do the duty for him, and who shall be approved of by the said Court.

2d. How appointed and Sworn.

By Act of Assembly, 1839, p. 36, sec. 30, each magistrate may ^{Form of appointment.} appoint one constable; and the evidence of his appointment to be filed with the clerk, shall be a certificate in form following.

I hereby nominate and appoint A. B. constable, this day of
18

C. D.

Magistrate for district.

But there shall not be, at any time, more constables in any district than there are magistrates, and a vacancy in the office of constable shall be supplied in the form prescribed by the magistrate first appoint- ^{Number of vacancies filled.} ing him, if still in office, or by his successor, always specifying the vacancy supplied.—Ib.

The parishes of St. Philip's and St. Michael's are exempt from the operation of this act. And in said parishes, the number of constables ^{Except in St. P. and St. M.} are limited to fifteen, and must be elected by a majority of the Board of Magistrates, and may, in like manner, on conviction before said Board, of any official misconduct, be removed from office.

By Act of 1839, p. 55, when any person shall receive the appointment of constable, he shall repair to the clerk's office of the district, ^{Giving bond.} and together with the evidence of his appointment, he shall lodge his bond in form following.

STATE OF SOUTH-CAROLINA.

Know all men by these presents, that we (name of person and sureties,) are held and firmly bound unto the State of South-Carolina, in ^{Form of bond.} the penal sum of five hundred dollars, to the payment of which, well and truly to be made, we bind ourselves, and each and every of us, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this day of Anno Domini, one thousand eight hundred and and in the year of the independence of the United States of America.

Whereas the above bound C. D. hath been appointed to the office of constable; Now the condition of the above obligation is such, that if the above bound C. D., shall well and truly perform the duties of said office, as now or hereafter required by law, during the whole period he may continue in said office, then the above obligation to be void and of none effect, or else to remain in full force and virtue.

Sealed and delivered in the presence of,

[L. s.]

[L. s.]

[L. s.]

Sureties.

With good sureties to said bond, not less than two, nor more than five, to be approved, in writing, by the clerk, and upon taking the following oath,—“I do solemnly swear (or affirm) that I will be faithful and true allegiance bear to the State of South-Carolina, so long as I may continue a citizen thereof; and that I am duly qualified according to the Constitution of this State, to exercise the office to which I have been appointed, and that I will, to the best of my abilities, discharge the duties thereof, and preserve, protect, and defend, the Constitution of this State and of the United States, so help me God.”

Oath.

“And I further swear (or affirm) that I will enforce, and to the extent of my power and ability, carry into effect the statute against gaming, passed the 19th day of December, 1816, and in all cases, bring to justice violations of the same, whenever such violations shall come within my view and knowledge; so help me God.” Such person filing the bond, and taking the oath as above, shall be entitled to a certificate from the clerk that he has filed his bond, and taken the requisite oaths, and shall thence be regarded as a regularly qualified constable; nor shall any person, not so qualified, exercise the powers of a constable.

Special constables.

Special constables may be appointed by a presiding judge, or a magistrate, to act by virtue of such appointment, only on a particular occasion, specified in writing. Act 1837, p. 55.

May be compelled to serve.

A person lawfully appointed, as constable, if he shall refuse to be sworn, may be bound over by a magistrate, to appear at the next Court of Sessions, there to be indicted. Dalt., c. 28.

3d. Of term of office, the extent of his jurisdiction, and his authority.

Term of office.

The term of the office of constable shall be four years, to be estimated from the time he qualifies before the clerk. Act 1839, p. 55, sec. 1st. But he is not bound to serve more than two years. 6th S. L., 180.

Every qualified constable shall be entitled to exercise his office Extent of jurisdiction. throughout the judicial district in which he may be appointed.

Every constable shall be a conservator of the peace; shall take Of his authority. into custody, and carry before the nearest magistrate, any person or persons who may be in his view, engaged in riotous conduct or open violation of the peace, and refuse, upon his command, to desist therefrom; and also any person who may in his view commit any felony or misdemeanor; and for the purpose of preserving the peace, and also executing any criminal process, every constable shall have power of ordering out such posse comitatus to his assistance, as may be necessary to enable him to discharge his duty; and any person refusing to obey his summons, shall be liable to indictment and punishment as for a misdemeanor. Act 1839, p. 56, sec. 10.

He may break open doors to see the peace kept, and may justify the beating of those who resist him. 1st Nelson's Justice, 229.

4th. Of his duty and liability.

A constable is authorized, and he shall be bound faithfully and Execute process. promptly to execute all process lawfully directed to him by competent authority; he shall make return on oath to the person issuing the Return. process, to be indorsed in writing on the same, of his proceedings by virtue of it: he shall, in every case where he may levy an execution, or serve an attachment on personalty, specify by indorsement on the execution, or attachment, or by schedule thereunto annexed, a list of every article so levied on or attached, and forthwith lodge a copy of such list with the person issuing the process under which he acts: in all cases of sale, he shall give ten days notice, by advertisement, at two of the most public places in the neighborhood, of the time and place of such sale; and in default of paying over the amount of any debt collected, to the party entitled, or his lawful agent, or to the For not paying money collected. magistrate, upon demand, or in default of returning to the defendant, upon demand, any overplus which may be in the hands of the constable, he shall be liable to pay in either case, to the party in interest, the original sum and ten per cent. per month, to be recovered before a magistrate, if not more than twenty dollars in amount; if greater, before the Court of Common Pleas by petition, besides being liable to be indicted and punished as for a misdemeanor. A. 1839, p. 56, sec. 5th.

Every constable shall be bound to execute, when required, every To execute orders of magistrate. lawful order, judgement, and determination of the magistrate, and of any Court constituted of a magistrate, or magistrates and freeholders;

and for disobedience herein, he shall be liable to be indicted and punished as for a high misdemeanor. Act 1839, p. 56.

To attend Court.

All, or so many of the constables of any district as may be required by the sheriff, shall be bound to attend any of the Courts of Common Pleas or Equity, shall be officers of the Court, and perform the appropriate duties and services assigned them by the sheriff and presiding judge; and each constable so attending, shall be entitled to receive the compensation of one dollar and fifty cents for each day's attendance. Act of 1839, p. 56, sec. 9.

To arrest free negroes entering in the State.

It is the duty of any constable, in any parish or district in which any free person of color may enter into the State, upon information of the migration or introduction of such free person of color, to arrest and bring such person before a magistrate.

To serve the warrant of coroner.

Any constable or sheriff, to whom the warrant of coroner shall come, shall forthwith execute the same, and repair unto the place at the time therein mentioned, and make return of the warrant, with his proceedings thereon, to the coroner that granted it; and any constable or sheriff failing to perform the duty required of him by such warrant, or failing to return the same as aforesaid without reasonable excuse, shall forfeit and pay the sum of twenty dollars, to be recovered by indictment. Act of 1839, p. 50, sec. 10.

5th. His protection in his office.

If sued.

If an action is brought against a constable for any thing done by virtue of his office, he, and also all others, who, in his aid, or by his command, shall do any thing concerning his office, may plead the general issue, and give the special matter in evidence; and if he recovers, he shall have double costs. A. A., No. 581.

If assaulted.

If a constable is assaulted in the execution of his office, he need not go back to the wall, as a private person ought to do; and if in the striving together the constable kills the assailant, it is no felony; but if the constable is killed, it shall be construed premeditated murder. Hale's Pl., 37.

6th. Punishment and removal.

For oppression, etc.

For oppression in office, whether by undue personal violence, cruelty, taking an amount of property, in unreasonable proportion to the sum to be collected, or for any wilful official misconduct, habitual negligence, habitual drunkenness, or fraud, when established to the satisfaction of a jury, upon indictment, a constable shall be punished by imprisonment not exceeding one year, and fined not exceeding one

Fine and imprisonment.

thousand dollars, at the discretion of the Court, besides being liable to an action on the case by the party aggrieved; but if any such action for damages shall be instituted against a constable, and the plaintiff fails, he shall be liable to be mulcted in double or treble costs, by order, and at the discretion of the presiding judge.

Upon the conviction of any constable, by indictment, the judge, ^{Office vacated.} before whom the case may be tried, shall have power, by order, to declare the convict to be removed from office; whereupon his office shall be deemed vacant, and the vacancy may be filled by the magistrate who originally appointed him, if in office, or by his successor, in manner as prescribed for original appointments. Act of 1839, p. 56, secs. 7 and 8.

In the parishes of St. Philip's and St. Michael's, the board of magistrates shall be, and are hereby, vested with the power of trying the constables now appointed, or hereafter to be appointed by them, for misbehaviour, or malfeasance in office, and to suspend or remove from office such constable or constables as shall be convicted thereof by a majority of the said board. 6th S. L., p. 418, sec. 2. ^{Constable to be tried by magistrates.}

CONTEMPT.

[See ATTACHMENT FOR.]

C O R N .

[See BURNING.]

1st. *Stealing of.*

At common law, the stealing of gathered corn was punished as a larceny; but the taking it from a field was only a trespass, for which a civil action would lie. But if the person shall cut it at one time, and come again another time and take it away, it is felony. ^{At common law.}

By Act of 1826, 6 S. L., p. 284, it is enacted, that from and after the first day of June next, if any person shall take, from any field not belonging to such person, any cotton, corn, rice, or other grain, fraudulently, with an intent secretly to convert the same to the use of such person taking the same, such person so offending shall be guilty of larceny, either grand or petit, as the value of the property may be. ^{By Statute.}

2d. Buying from a slave.

Penalty for purchasing cotton, rice, indian corn or wheat, from a slave.

By Act of 1834, 6 S. L., p. 516, sec. 1, it is enacted, that if a shop-keeper or trader shall, directly or indirectly, purchase from a slave, any cotton, rice, indian corn or wheat, either with or without a permit, such shop-keeper or trader shall, for every such offence upon conviction thereof, be fined a sum not exceeding one thousand dollars, and be imprisoned for a term not exceeding twelve months nor less than one month.

What is evidence of purchase.

Sec. 2. If any shop-keeper or trader shall receive any cotton, rice, indian corn or wheat, from any slave, he or she shall be presumed to have purchased the same; and the burthen of proof, that the same was not purchased, shall lie on the person charged or accused.

The act of clerk or agent is the act of the principal.

Sec. 3. In all cases of buying or selling any cotton, rice, indian corn or wheat, contemplated and included in the preceding sections of this Act, the act of the clerk or agent of any shop-keeper or trader shall be considered the act of the shop-keeper or trader himself, as done by his authority; subject, however, to proof to the contrary.

Penalty for purchasing cotton, or milled rice, from free persons of colour.

Sec. 5. If any shop-keeper or trader, within the parishes of St. Philip's and St. Michael's, shall, directly or indirectly, purchase or receive from any free person of colour residing within the said parishes any cotton or milled rice, such shop-keeper or trader shall, for every such offence, upon conviction thereof, be liable to all the penalties imposed by this Act, on shop-keepers or traders purchasing from slaves, unless such free person of colour shall have the written permission of his guardian to sell such cotton or milled rice. By Act of 1839, p. 49, et seq.

CORONER.

Coroners, how appointed.

Be it enacted, by the Honorable the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, that a coroner for each of the judicial districts in this State, shall be appointed by joint resolution of the Senate and House of Representatives.

Term of office.

Every coroner so appointed shall continue in office four years from the time of his appointment, and until a successor shall be appointed and enter on the duties of his office.

Vacancies.

Whenever any vacancy shall occur in the said office, by death

resignation or otherwise, during the recess of the Legislature, the same shall be filled by the Governor, which appointment shall continue until the end of the next session of the Legislature, and until a successor shall be appointed.

Every coroner, before entering on the duties of his office, shall give bond in the form now required by law of all public officers, with good sureties, in the sum of five thousand dollars, except the coroner for Charleston district, who shall give bond in the sum of ten thousand dollars, which bond, after being duly approved according to law, shall be lodged in the office of the Treasurer of the Division to which his district belongs. Bond.

Every coroner, before entering on the duties of his office, shall, before some lawful magistrate of the district for which he is appointed, take the oath of office, prescribed by the amendment to the fourth article of the Constitution, which shall be indorsed on the back of his commission, and signed by him, and by the magistrate before whom it was taken. Oath.

It shall be the duty of the Governor, when a person appointed coroner, has given bond and complied with the other requisitions herein before prescribed, and when such person produces a certificate from the Treasurer of the Division in which he lives, that his bond has been lodged in the office of the said Treasurer, to commission such person, according to the provisions of this act. Commission.

No coroner shall act as jailor, deputy sheriff, or under any appointment by a sheriff, or hold any other appointment whatsoever, made by the sheriff of his district: and if any coroner shall accept, or shall act under the appointment of the sheriff of his district, his office as coroner shall be vacated, and the Governor shall fill the vacancy on application, and the appointment so made, shall continue until another shall be appointed, as directed heretofore. Not to act as jailor, deputy sheriff, &c.

Every coroner within the district for which he has been appointed is empowered to take inquests of casual or violent deaths, committed or happening where any dead body is lying within his district. To take inquests.

When the coroner shall be informed of, or shall see the dead body of any person, supposed to have come to a violent and untimely death, found lying within his district, he shall make out his warrant, directed to all or any of the constables of his district, or to the sheriff of his district, requiring them or any of them, forthwith, to summon a jury of fourteen men, of the district, to appear before him, at the time and place specified in the warrant, which warrant shall be in this form. Mode of summoning a jury.

THE STATE OF SOUTH-CAROLINA.

To the sheriff, or to any constable or constables, (as the case may be) of district. Greeting.

These are to require you, immediately on receipt and sight hereof to summon and warn, verbally, or otherwise, fourteen men of the said district, to be and appear before me, the coroner of the said district at , within the said district, between the hours of and of o'clock, on the day of , then and there to inquire, upon the view of a body of a certain person there lying dead, how he came to his death. Fail not herein, as you will answer the contrary at your peril. Given under my hand and seal, at , this day of A. D., by me.

A. B., [L. S.
Coroner for district.

Any constable or sheriff to execute warrant.

Any constable or sheriff, to whom such warrant shall come, shall forthwith execute the same, and repair unto the place at the time therein mentioned, and make return of the warrant, with his proceedings thereon, to the coroner that granted it; and every constable or sheriff, failing to perform the duty by such warrant required of him, or failing to return the same as aforesaid, shall forfeit and pay the sum of twenty dollars, without reasonable excuse, to be recovered by indictment; and each and every person summoned and warned as aforesaid, to be a juror, and failing to appear and act as such juror, shall also forfeit and pay the sum of twenty dollars, without reasonable excuse, to be recovered by indictment.

Persons liable to serve as jurors.

All free white men of the age of twenty-one years, shall be liable to serve as jurors on an inquest on a dead body, found within their district.

Number of jurors and oath.

Of the jurors summoned and appearing, the coroner shall swear twelve or more, and administer to the foreman appointed by him, an oath, in the form following: "You shall enquire and true presentment make, on behalf of the State of South-Carolina, in what manner A. B., here lying dead, came to his death; and you shall deliver a true verdict thereon, according to such evidence as shall be given, and according to your knowledge; so help you God." And to the others he shall administer an oath in this form: "The oath which your foreman hath taken on his part, you shall well and truly observe and keep on your part; so help you God."

Charge to jury.

The jury so sworn shall be charged by the coroner to declare upon oath, whether the deceased came to his death by mischance and accident, or by felony; and if by felony, whether by his own or another's;

and if by mischance, whether by the act of God or man; and if he died of another's felony, who were principals, and who accessaries; who threatened him, of life or murder, and with what instrument he was struck or wounded; and if by mischance or accident, by the act of God or man, whether by hurt, fall, stroke, drowning, or otherwise: and he shall also charge them to enquire of the persons that were present at the finding of the body, whether he were killed in the same place or elsewhere, and if elsewhere, by whom, or how he was there brought, and of all other circumstances.

If the jury, so charged, find that the deceased came to his death by his own felony, they shall further enquire into the manner, names and instrument, and into all the circumstances of the death. Enquiry in cases of suicide.

The jury being charged, they must stand together until proclamation be made for any that can give evidence to draw near, and they shall be heard. Proclamation.

The coroner shall have power to issue a warrant or warrants, to summon witnesses, and to examine before the jury any person present, whether summoned or not, concerning the death; and every person summoned or required to give evidence, and disregarding such summons, or refusing to testify, without such excuse as shall be lawful and sufficient, shall forfeit and pay the sum of twenty dollars, and shall be committed to jail by the coroner, until the next Court of Sessions, or until he testifies, and is discharged by the coroner; (the said forfeiture to be recovered by indictment.) and in addition, shall be liable to be indicted at the next Court of Sessions for the district, and upon conviction, shall be fined and imprisoned at the discretion of the Court. And the coroner shall bind such witness or witnesses, so appearing, by recognizance, with good and sufficient sureties, to appear at the next Court of Sessions, to stand his trial; and the witness refusing to enter into such recognizance, shall be forthwith committed to the jail of the district, by commitment under the hand and seal of the coroner, there to be kept until he enter into such recognizance, as is before required. Power to issue warrants, summon, examine, bind over, commit, etc.

A coroner shall have power, if he deem it necessary, to adjourn the jury, either from day to day, or to any other day and place, to receive evidence, binding the jurors severally by one recognizance, in such amount as he shall think fit for their appearance; which recognizance may be estreated, as to any of the cosurers for default, by the Court of General Sessions. Power to adjourn the jury. bind jurors, etc.

If all or any of the jurors should fail to reappear at the day and place to which they were adjourned, the coroner shall issue his war- Absent jurors supplied, etc.

rant to supply the places of the absent jury, or so many of the jurors absent, as may be necessary; and the jury or jurors last summoned shall be sworn and charged as those first summoned were, and shall have the same powers, and be liable to the same penalties.

Oath of
witnesses.

The witnesses examined upon the inquest, shall be sworn, as follows, by the coroner, who is empowered to administer the oath, thus to say: "The evidence you shall give to this inquest, concerning the death of A. B., here lying dead, shall be the truth, the whole truth and nothing but the truth; so help you God."

To take
down testi-
mony in
writing, and
bind over or
commit
witnesses.

The testimony of all witnesses examined upon an inquest, shall be taken down in writing by the coroner, and signed by the witnesses; and if the testimony given tends to criminate any person, as concerned in the death of the deceased, the coroner shall bind over the witness who gave it, in recognizance, with sufficient surety, to appear at the next Court of General Sessions to be holden for the district, to give evidence concerning the death; and such witness, for refusing to enter into recognizance, shall be committed by the coroner to the jail of the district, by warrant under his hand and seal, there to be kept until the session of the Court, or until he shall enter into recognizance, as required.

Form of
verdict.

The jury having viewed the body, heard the evidence, and made enquiry into the cause and manner of the death, shall render their verdict thereon, in writing, to the coroner, under their hands and seals, in the manner following, (which shall pass by indenture, interchangeably between the coroner and jury,) that is to say:

SOUTH CAROLINA, }
District. }

An inquisition indented, taken at , in , district, the day of , A. D., before A. B., coroner, (or C. D., magistrate, acting as coroner for said district,) upon view of the body of E. F., of , then and there being dead, by the oaths of (inserting the names of the jurors,) being a lawful jury of inquest, who being charged and sworn to enquire, for the State of South-Carolina, where and by what means the said E. F. came to his death, upon their oaths do say, &c., (inserting how, where, at what time, and by what instrument the deceased was killed;) and if it shall appear that the deceased was wilfully killed by another, the inquisition must be concluded in this form: "And so the jurors aforesaid, upon their oaths aforesaid, do say that the aforesaid J. K., in manner and form aforesaid, E. F., then and there feloniously did kill, against the peace and dignity of the same State aforesaid."

If it shall appear that the deceased came to his death by means ^{Finding in case of death by means unknown.} unknown to the jury, the inquisition shall conclude thus: "That the said E. F. was killed and murdered by some person or persons (or by some means) to the jurors unknown, against the peace and dignity of the same State aforesaid."

If it appear that he died by self-murder, the inquisition shall con- ^{Finding in case of death by self murder.} clude: "That the said E. F., in manner and form aforesaid, then and there, voluntarily and feloniously, himself did kill, against the peace and dignity of the same State aforesaid."

If it appear that the deceased came to his death by mischance, the ^{By mischance.} finding shall conclude: "That A. B., in manner and form aforesaid, came to his death by misfortune or accident."

If the proof shall be, that the death was occasioned by the hands of ^{By the hand of another.} another, the conclusion shall be: "That I. K., the said E. F., by misfortune, and contrary to his will, in manner and form aforesaid, did kill and slay."

After the conclusion above, according to the facts, the inquisition ^{Form of signature.} shall end in this form: "In witness whereof, I, coroner aforesaid, and the jurors aforesaid, to this inquisition have interchangeably put our hands and seals, the day and year above mentioned.

A. B., [L. s.]

Coroner district.

C. D., [L. s.]

Foreman of the jury of inquest.

E. F., &c., [L. s.]

Jurors."

If the finding of the inquest be wilful killing, by the hands, or means ^{Warrant in case of murder.} of another, the coroner shall forthwith issue his warrant, directed to the sheriff, or to one or more constables for the district, for all the persons implicated by said finding, which warrant shall be in this form:

THE STATE OF SOUTH-CAROLINA.

By A. B., Coroner, or C. D., Magistrate, acting as Coroner for district, to Sheriff of district.

Whereas, by inquisition by me held, on (time and place inserted.) it was found that (here insert the finding of jury); these are therefore to command you, forthwith to apprehend (here insert the name or names of the accused) and bring him, or them, before me, to be dealt with according to law. Given under my hand and seal, this day of A. D.,

A. B., Coroner. [L. s.]

or, C. D., Magistrate, acting as Coroner. [L. s.]

Commitment.

Upon the return of the said warrant, and the arrest of the party parties, the coroner shall proceed to commit him, by warrant, in the following form :

To the Sheriff or Jailor of district.

You are hereby commanded and required to receive and keep close confinement, in the jail of your district, (here insert the name of the party) charged before me by the finding of a jury of inquest held on the day of A. D., at with (here insert finding,) until he (she or they) shall be delivered by due course of law. Herein fail not. Given under my hand and seal, this day of A. D.,

A. B., Coroner. [L. s.]

or, C. D., Magistrate, acting as Coroner. [L. s.]

Sheriffs, etc., to keep persons committed.

And all sheriffs and jailors are hereby required to receive and keep securely, all persons so committed by the coroner.

To bind over party killing by mischance, and witnesses.

If the finding of the inquest be, that the deceased came to his death by mischance, by the hands of another, the coroner shall bind in recognizance, with sufficient surety, the party against whom the verdict has been rendered, to appear at the next Court of Sessions for the district that the matter may be then and there inquired into; and the coroner shall also bind over by recognizance, with good surety, all such witnesses as were examined before the jury of inquest.

Book of Inquisitions.

Every coroner shall keep a book, to be called "The Coroner's Book of Inquisitions," in which he shall copy all inquests found within his district, together with the evidence taken before the jury, and all proceedings had before or after their finding.

Inquisition, etc., to be returned to clerk.

The original inquisition and evidence, as taken by him, shall be returned by the coroner, within ten days next after the finding thereof, to the clerk of the Court of Common Pleas, for the district in which it was found.

Indorsement on return.

The coroner, before he returns such inquisition and evidence, shall indorse the same in this form :

SOUTH-CAROLINA, }
 . District. }

The State vs. the dead body of A. B.

Inquisition taken this day of A. D., by coroner for said district, entered and recorded in Coroner's Book of Inquisition page this day of A. D.,

Penalty for burying a body without inquiry, etc.

If any person shall bury, or cause to be buried, the dead body of a person, supposed to have come to a violent death, before notice to

coroner to examine the body, and making inquiry into the manner and circumstances of the death, as before directed, such person shall be liable to indictment therefor, before the Court of Sessions; and upon conviction, shall be fined and imprisoned, at the discretion of the presiding judge.

If the coroner shall know, or be informed of the interment of the body of a person, supposed to have come to a violent death, he shall proceed to empanel a jury, as is herein before directed, and order such body to be taken up, and shall conduct his examination into the cause and manner of the death, as though such body had not been buried. Body to be taken up, etc.

If the body has been so long dead and buried, or so injured by improper keeping, as that the cause of death cannot be ascertained, upon the examination, the coroner shall make record of the fact, stating its condition, by whom and how long it had been kept or buried, the circumstances of the burial, and the identity, (if discovered); which record shall be entered in his book, and returned, as any other inquisition, to the clerk of the Court of General Sessions for the district. Record of body long dead, etc.

The person burying, or directing the burial of the dead body of one supposed to have come to a casual or violent death, without due notice to the coroner, upon conviction thereof, by indictment in the Court of Sessions, shall be liable to be fined and imprisoned, at the discretion of the Court. And the coroner shall bind him in recognizance, with sufficient surety, to appear and stand his trial at the ensuing term of said Court. Liability for burial without inquiry.

The coroner shall keep an office at the Court House in his district, which shall have proper fixtures, and in which shall be kept his book of inquisitions; which book shall be public property, and shall be turned over to his successor in office. Office, etc. to be kept at C. H.

The sheriff of each district shall set apart in the jail, a room for the confinement of such persons as may be exclusively in the custody of the coroner, of which the coroner shall have exclusive control. Sheriff to set apart a separate room in jail.

The coroner shall be entitled to charge the following fees, and none other: For every inquisition, eight dollars and fifty cents; for mileage, (if over five miles from the coroner's residence) the same as is allowed to the sheriff, going and returning; for each warrant issued, fifty cents; for each commitment, fifty cents; for each recognizance, seventy-five cents; for each body disinterred, three dollars; for recording proceeding in each inquisition, in his book, twelve cents per copy sheet of ninety words. Fees.

If the sheriff shall be a party, plaintiff or defendant, in any judicial process, execution, warrant, summons, or notice, to be served, or exe-

To act as sheriff in cases in which he is interested.

cuted within his district, the coroner shall serve or execute such process, execution, warrant, summons or notice: in the discharge of which duties, he shall incur such liabilities as would by law attach to their performance by the sheriff himself.

And during a vacancy.

If a vacancy shall occur in the office of sheriff, the coroner, during the continuance of such vacancy, shall assume the office, discharge its duties, incur its liabilities, and be entitled to its fees and emoluments; and shall, for such purpose, take charge of the books and papers of the office, and occupy the apartment allowed to the sheriff for transacting the business of his office. That for sufficient reasons shewn him, why the coroner cannot, or should not be employed, on satisfactory evidence that the office of coroner is vacant, or that the coroner will not act, any judge of the Court of Common Pleas, or a chancellor, in open Court, or at chambers, may, at the instance and risk of any person having a right to control such process, appoint any suitable person to serve or execute any writ or process, mesne or final, sued, or to be sued, from any Court of law or equity in this State, against any sheriff; and such person having accepted of such appointment, shall be entitled to receive the same process from the coroner, or other person having the possession of it; and, as respects the said process, shall be considered the coroner, and be vested with all the rights and powers, and liable to all the duties of the coroner.

Person substituted for coroner in certain cases.

Coroner to enter in a suitable book his proceedings as sheriff.

The coroner, while discharging the office of sheriff, shall provide a suitable book, in which he shall enter such executions or other papers as he may be directed to enter by competent authority; and also all new writs, processes, executions, or other papers, proper to be entered by a sheriff; and also all his proceedings as sheriff, in manner and form, as sheriffs are required by law to do; which book, or certified copy thereof, he shall leave in the sheriff's office, as a record.

Not bound to act, except specially instructed, etc.

The coroner shall not be bound to act upon any papers in the sheriff's office, except he be specially instructed: nor shall he be bound to embrace in his return to the clerk's office, any execution found in the sheriff's office, which is not entered in his book, or upon which he may not have taken any proceedings.

To make a list of prisoners.

As soon as the coroner shall enter upon the duties of sheriff, he shall, in the presence of the clerk of the Court, or jailor of the district if there be one, make a list of the prisoners in jail, signed by himself and the jailor, entered in the coroner's book, and the original lodged in the clerk's office.

Upon retiring from the sheriff's office, he shall turn over the papers of the office, and the prisoners in jail, to a succeeding sheriff, in manner and form, as sheriffs may be required to execute the same duty.

To turn over
papers, etc.,
to succeeding
sheriff.

All acts, or parts of acts, repugnant to this act, are hereby repealed. Act of 1839.

Repealing
clause.

C O S T S.

[See FEES.]

C O U N T E R F E I T I N G.

[See FORGERY.]

C O U R T S O F M A G I S T R A T E S A N D F R E E H O L D E R S.

[See APPRENTICE, CAUSES SMALL AND MEAN, DAMS, FORCIBLE ENTRY AND DETAINER, LANDLORD AND TENANT, SLAVES AND FREE PERSONS OF COLOR; OR FOR THE ORGANIZATION OF A COURT UNDER ANY PARTICULAR HEAD, SEE SUCH HEAD.]

D A M S A N D D R A I N S.

Dams in Rice Fields.

Every person who shall keep water, during the winter, upon grounds on which rice shall be planted the ensuing spring, shall, on or before the 10th day of March next, and on the 10th day of March, in each year, open the dams which keep up the water, in a sufficient manner for letting off the same; and if any person shall neglect so to do, on or before the time aforesaid, he shall pay the sum of £100 for every such neglect, upon the complaint or information of any person, through

To be
opened
in March.

Remedy on
neglect.

whose lands such water may pass. And such person may inform and sue for the same in any Court of record in the district where such offence is committed, and on conviction, the one half thereof shall be paid to the informer, and the other half to the use of the poor of such parish or district in which the cause or complaint shall lie. Where any person has neglected to open his dams in a sufficient manner for letting the water off the grounds before described, on or before the 10th day of March, in every year, any person who may be affected thereby, may at any time after the day aforesaid in every year, either by himself, or his overseer, agent, attorney, or trustee, apply to any magistrate in the district for a warrant of survey, who shall thereupon notify to the defendant the complaint made against him, with the time and place of meeting, and summon three freeholders, disinterested persons of the neighborhood or parish where the cause of complaint shall lie, one of whom shall be then chosen by the defendant; and in case of his refusal, then by the magistrate, another by the complainant, and the third by the magistrate; who, (being first sworn by such magistrate to determine the matter in dispute justly and impartially) shall forthwith proceed to view the obstructions complained of; and if on view thereof, the said freeholders, or a majority of them, shall be of opinion that such obstructions do or may prevent the party complaining from planting his crop of rice in proper time, then the said freeholders, or a majority of them, may cause the same to be immediately opened, or removed in any way or manner they shall think necessary, for the purpose of giving the most effectual relief to the party complaining. Whereupon the defendant shall be obliged to pay all expenses attending such survey. *Provided always*, that nothing herein contained shall extend or be construed to extend, to impose any penalty on any person, or to cause his dams and banks to be opened, who shall have made through his own lands a sufficient drain or drains, (of which the said freeholders shall be the judges) to carry off the waters passing through the same, in as expeditious a manner as they could have passed through the natural courses or channels, in case no such banks had been erected. A. A., No. 1420.

Proviso.

By an act to explain this act, it is said: Whereas doubts have arisen under the said act: *Be it enacted*, That nothing contained therein shall be construed to authorize any person or persons to keep water at any time on any land other than his, her or their own. A. A., 21 Dec. 1799.

Any person, at any time between the said 10th day of March, and

of November, in every year, may apply in manner aforesaid warrant to survey, on any obstructions which he may con-
Any person may have survey.
 pede the conveying of any surplus water on his rice grounds,

by remaining thereon may prove any way injurious; or
 y time hereafter make or keep up any dams, which shall
 urse of any water so as to overflow the lands of any other
 vithout the consent of such person first had and obtained.)

shall be injurious to the said person, then, in either of such
 said magistrate and the freeholders by him appointed, shall
 a the same manner as is directed in the foregoing clause.

always, that if in either of the cases last mentioned, the
 shall neglect or refuse to attend at the survey, to choose a

as aforesaid, then the three freeholders who shall have
 moned by the magistrate, shall proceed to determine the
 dispute, in the same manner as if the defendant had been
 nd had chosen a freeholder : which said freeholders, shall
 ses, certify to the said magistrate, under their hands, what
 been by them done in the premises; the expenses attending
 vey, shall be paid by the party against whom the award of
 eeholders shall be given.—1b.

erson, either by himself or any other person for him, shall
 y dam, or replace any obstructions which have been ordered
 ned or removed by any freeholders, or which have been
 removed by himself or his overseer, agent, attorney or
 by order of either of them, on the said 10th day of March,
 0th day of July, every person so offending shall pay the sum
 to be recovered and disposed of in manner aforesaid; and
 son shall obstruct, impede, or otherwise hinder, or interrupt
 ig of any dam, or the removing of any obstructions, ordered
 ned or removed by the freeholders, such person shall pay for
 h offence, the sum of £500, to be recovered and disposed of
 r aforesaid.—1b.

any dams have been made, or shall hereafter be made, for
 se of forming reservoirs of water, without a sufficient waste
 which now are or shall hereafter be found inadequate to
 e weight of water against the same, the owner of such dams
 ediate, or as soon as may be, cause the same to be enlarged
 ighened, where they are already made; and such as may
 be made, to be erected in a substantial manner, with a suffi-
 ite way; and if any person shall neglect to strengthen his
 dy erected, where necessary, or shall hereafter erect any

Penalty for
replacing
dam.

Waste way
and weak
dams.

for the purposes aforesaid, and which (in either case opinion of three freeholders, or a majority of them, (to be and to proceed in manner herein before mentioned, resp surveys of dams across rice grounds) is not made and re manner hereby prescribed, every person so offending, sha plaint of any person liable to be affected thereby, and on thereof in any court of record in the district where such committed, pay the sum of £100 for every such offence; v be sued for, and if recovered, be disposed of in manne^r afore

Every person to be summoned as aforesaid, shall be a i the parish where his attendance shall be required, and being duly summoned, and attending any survey as aforesai entitled to receive the sum of 9s. and 4d. per day, each such attendance, to be paid by the person against whom of the freeholders shall be given: and in case of the non- of any person, a resident, and summoned as aforesaid, (i vented by sickness, or some reasonable excuse, to be made to the satisfaction of such magistrate) he shall, without suc excuse, pay the sum of £10 per day for every such neglect

1st. Summons to three Freeholders.

District. } ss.

Whereas information hath been this day made before one of the justices assigned to keep the peace for the distri upon the oath of A. T., of , planter, that A. O., of the , having kept water during the winter upon ground rice is to be planted the present spring, has neglected i dams (which kept up the water) in a sufficient manner for off the same, to the damage of the said A. T. These ar to command you to summon A. B., B. C., and C. D., disinte sons of the neighborhood and residents, to be and appear a the district aforesaid, on the day of instant, at the morning, to view the obstructions complained of, and to the matter in dispute between the said A. T. and A. O., an the same to me, under their hands and upon their oaths. not at your peril. Given under my hand and seal, at in aforesaid, this day of , in the year .

2d. Notice to the person complained of.

Mr. A. O.,

Sir,

Information having been given me, on oath, by A. T., that you have neglected to open your dam on or before the tenth day of March instant, agreeably to the Act of Assembly, in that case made and provided; and the said A. T. having applied for a warrant of survey on such dam or obstructions; these are therefore to notify to you, that A. B., B. C., and C. D., are summoned to view the said obstructions, on the day of at o'clock in the morning. Given under my hand, this day of in the year I. P.

3d. The return of the freeholders.

We, A. B., B. C., and C. D., freeholders of district, by virtue of a warrant under the hand of I. P., one of the justices assigned to keep the peace in and for the district aforesaid, dated the day of in the year went as directed by the said warrant, to [here mention the place] in the said district, and there (first being duly sworn) having viewed the said dam or obstructions, belonging to the said A. O., and which is now complained of by A. T., we are of opinion, that such dam or obstructions prevent A. T. from planting his crop of rice in proper time, and thereupon have caused the said dam to be immediately cut and opened. Given under our hands this day of in the year

A. B.

B. C.

C. D.

4th. Form of an execution to levy the cost of suit.

District. } ss.

By I. P., one of the justices assigned to keep the peace in the district of

To any lawful Constable.

These are to charge and command you, that of the goods and chattels of A. O., of the district aforesaid, planter, you levy, or cause to be levied, the sum of lawful money of this State, for his costs, for a warrant of survey obtained by A. T., on the day of last past, for the purpose of viewing the dam of him, the said A. O., which he, the said A. O., had neglected to open, agreeably to the directions of the Act of Assembly in that case made and provided, as appears by the

return of A. B., B. C., and C. D., freeholders appointed for that purpose. Given under my hand and seal, this day of in the
year I. P. [L. s.]

DEAD BODIES.

[See CORONER.]

Taking up
dead bodies,
even for the
purposes of
dissection, is
an indictable
offence.

It has been holden, that it is an indictable offence to take up a dead body, even for the purpose of dissection. Upon an indictment for this offence, it was moved, in arrest of judgment, that if it were any crime, it was one of ecclesiastical cognizance only; that it was not made penal by any statute; and that the silence of Stamford, Hale and Hawkins, upon this subject, afforded a very strong argument to show that there was no such offence cognizable in the criminal courts. But the Court said, "that common decency required that the practice should be put a stop to; that the offence was cognizable in a Court as being highly indecent, and *contra bonos mores*; at the bare idea alone of which nature revolted. That the purpose of taking up the body for dissection, did not make it less an indictable offence; and that, as it had been the regular practice of the Old Bailey in modern times, to try charges of this nature, many of which had induced punishment, the circumstance of no writ of error having been brought to reverse any of these judgements, was a strong proof of the universal opinion of the profession upon this subject; and they, therefore, refused even to grant a rule to show cause, lest that alone should convey to the public an idea that they entertained a doubt respecting the crime alleged. 1 Russ., 414.

Taking up to
sell.

It is an offence against decency, to take a person's dead body, with intent to sell or dispose of it for gain and profit. An indictment charged (*inter alia*) that the prisoner a certain dead body of a person, unknown, lately before deceased, wilfully, unlawfully, and indecently, did take and carry away, with intent to sell and dispose of the same, for gain and profit: and it being evident that the prisoner had taken the body from some burial ground, though from what particular place was uncertain, he was found guilty upon this count. And it was considered that this was so clearly an indictable offence, that no case was reserved —Ib.

The refusal or neglect to bury dead bodies, by those, whose duty it is to perform the office, appears also to have been considered as a misdemeanor. Thus, Abney, J., in delivering the opinion of the Court of Common Pleas, said: "The burial of the dead is (as I apprehend) the duty of every parochial priest and minister; and if he neglect or refuse to perform the office, he may, by the express words of Canon LXXXVI, be suspended by the Ordinary for three months. And if any temporal inconvenience arise, as a nuisance, from the neglect of the interment of the dead corpses, he is punished also by the temporal Courts, by indictment or information.—Ib.

There is one case in which the too speedy interment of a dead body may be an indictable offence; namely, where it is the body of a person who has died a violent death. In such case, by Holt, C. J., the coroner need not go *ex officio* to take the inquest, but ought to be sent for, and that when the body is fresh; and to bury the body before he is sent for, or without sending for him, is a misdemeanor. It is also laid down, that if a dead body in prison, or other place, whereupon an inquest ought to be taken, be interred, or suffered to lie so long that it putrify before the coroner has viewed it, the jailor or township shall be amerced.—Ibid.

D E E R .

Any person who shall hunt with fire, in the night time, for every such offence shall pay a sum not exceeding £2; and for every deer so killed, a sum not exceeding £5; and for every horse or head of neat cattle, or other stock of any kind, a sum not exceeding £10; which may be recovered before any one justice of the peace, and four disinterested freeholders of the parish or county where the offence shall be committed; and when recovered shall be paid, one half to the use of the parish or county, and the other half to the informer, who shall sue for and recover the same; and if any person so convicted, shall refuse or neglect to pay such fine, then the justice before whom he shall be convicted, is required to commit such person to the jail in the county or district, where the offender shall have committed the said crime, there to remain without bail or mainprize, not exceeding three months. A. A., No. 1586.

Liable to action.

Any person who shall hunt with fire, in the night time, or kill any horse or neat cattle, or other stock of any kind, the property of another person, shall be liable to an action at law by the person so aggrieved, in addition to the above penalties.—Ib.

Slaves.

In case any slave shall be detected in fire hunting, or shall kill, in the night time, any deer, horse or neat cattle, or stock of any kind, not the property of his owner, he shall, on conviction before any one justice, and four disinterested freeholders of the county or district where the offence was committed, receive such corporal punishment, not extending to life or limb, nor exceeding thirty-nine lashes, as they shall direct; or in case that it shall appear upon evidence to the satisfaction of the Court, that the said offence was committed with the privity and consent of the owner or overseer of the said slave, such owner or overseer, as the case may be, shall be liable to the same penalty, fine and imprisonment, as if he had personally committed the said offence, to be recovered and applied in the same manner as is directed by the first clause.—Ib.

Oath of freeholders.

The four freeholders, previous to their entering on the trial, shall take the following oath or affirmation, before the justice who is empowered to administer the same. I, A. B., do swear, or affirm, (as the case may be) that I will, to the best of my judgement, without partiality, favour or affection, try the cause now depending between A., plaintiff, and B., defendant, and a true verdict give according to evidence: *So help me God.*—Ib.

Magistrate to issue warrant.

It shall, and may be lawful, for any justice of the peace, before whom information shall be lodged of any breach of this ordinance, to issue his warrant to any lawful constable, commanding him to summon a sufficient number of disinterested freeholders, to appear at a certain time and place, for the purpose of hearing, trying and determining on the said information; and the freeholders so summoned, are hereby required to attend, on pain of forfeiting the sum of 10s. each, for neglect, to be sued and levied, and applied as herein before mentioned, by authority of the same justice of the peace, unless such defaulter shall give a good and sufficient excuse, on oath, to the satisfaction of the said justice.—Ib.

To be read at company.

The captains of the several companies of militia are required to cause this ordinance to be read at the head of their respective companies, at least once in ten months, on pain of being chargeable with neglect of duty, and to be proceeded against as a court martial may direct.—Ib.

Any person convicted of killing does, between the first day of March and the first day of September, shall be liable to the fines, ~~Killing Does.~~ forfeitures and penalties imposed by this ordinance, to be recovered and applied as is above directed—Ib.

DEFAMATION.

[See LIBEL.]

DISCOUNT.

By Act of 1759, 4th S. L., p. 76, made perpetual by Act of 1783, 4th S. L., p. 541; Whereas, for the sake of justice, and to prevent a multiplicity of suits, that some rule should be established with regard to discounts in this Province: *Be it enacted, therefore*, by the authority aforesaid, That in all actions whatever, brought for the recovery of any debt, by any plaintiff, either in his own right or in the right of his wife, or as executor or administrator of any person deceased, against any defendant, either in his own right or in the right of his wife, or as executor or administrator of any person deceased, it shall and may be lawful for the defendant, if he have any account, reckoning, demand, cause, matter or thing against the plaintiff, to give the same in evidence, by way of discount; regard being always had to the cause of action, so that accounts, reckonings, demands, causes, matters or things, relating to the defendant, in his own right, shall only be given in evidence, by way of discount, to actions brought against such defendant in his own right; and so if such defendant is sued in the right of his wife, or as executor or administrator of any person deceased; and the same shall be noted, and judgement be entered up for the balance only; and if the plaintiff be found to be indebted to the defendant, judgement shall be entered for

Discounts allowed in actions of the same nature.

the defendant, with costs of suit, and execution go against the plaintiff. *Provided, nevertheless*, that the defendant intending to discount any sum or sums of money, accounts, reckonings, demands, matters or things alledged to be due, and owing to him from the plaintiff, do make a copy of such sums, accounts, reckonings, demands, matters, causes, or things, which he intends to insist upon at the trial to have discounted, and deliver the same, with a notice of such intention, in writing, to the plaintiff or his attorney, at least twelve days before the trial of the cause, to the intent that the plaintiff may be prepared to disprove the same if he see fit; and the articles of such discount shall be proved to the Court where such cause shall be tried, in such manner as plaintiffs are obliged to prove their debts and demands. *Provided also*, that no such discount or set-off shall be admitted or allowed contrary to the intention and meaning of an Act of the General Assembly of this Province, entitled, "An Act for settling the titles of the inhabitants of this Province to their possessions in their estate within the same, and for limitations of actions, and for avoiding suit in law," passed the twelfth day of December, one thousand seven hundred and twelve.

Twelve days
notice of set-
off to be
given to
plaintiff.

No set-off
allowed
contrary to
an act.

1st. What causes of actions may be offered in discounts.

Torts.

Torts and trespasses are not discountable under our discount law only money transactions or mutual accounts. *Gibbs vs. Mitchell* 2 Bay, 351.

Amounts
above the
jurisdiction.

No discount can be set off, the amount of which exceeds the jurisdiction. Nor may the defendants withdraw a part of the discount in order to give jurisdiction. *Wells vs. Reynolds*, 1 Tr., 478.

Notes and
open
accounts.

A note, not negotiable, may be set up in discount by a party to whom it is assigned; *Farr vs. Henningway*; 2 Tr., 753. But an open account may not. *Brown vs. Thompson*, 2 Mc., 476.

Insolvent
debtor.

In a suit by the assignees of an insolvent debtor, a person who owned the estate at the time of the assignment, cannot set up in discount a debt afterwards acquired. *Assignees of Lowrie vs. Hinds*, 3 Mc. 247

Debt due.

A debt to be set off must be due and owing to the defendant at the time he was sued, and he will not be permitted to set up in discount a demand acquired by him after suit brought. *Shepherd vs. Turner* 3 Mc., 249.

2d. Against and by what Parties.

Administra-
tor.

An administrator may not be sued within nine months from the death of his intestate, yet if he sue, the defendant may, nevertheless plead a discount. *Cunningham vs. Baker*, 2 N. & Mc., 399.

In an action by an administrator, the defendant shall not be permitted to set off a demand which he acquired after the death of the intestate, as it might disturb the order of distribution directed by law, in case of intestates' estates. *Schmidts, administrator, vs. Crafts*, 2 Brevard, 266.

The private debt of one co-partner cannot be set off against a ^{Partner.} demand of partnership. *Powrie & Dawson vs. Fletcher & Philips*, 2 Bay, 146.

When a defendant is sued for articles sold him by an agent, he may not set up in discount a debt due him by an agent, if he knew of the agency at the time he bought the articles, or if it came to his Agent. knowledge before the indebtedness of the agent to said defendant. *Administrators of W. Conyers vs. John Magrath*, 4 McCord, 392.

DISFIGURING.

[See *CATTLE, MALICIOUS MISCHIEF, MAYHEM, &C.*]

DISORDERLY HOUSES.

All disorderly inns or ale-houses, bawdy houses, gaming houses, play houses, unlicensed or improperly conducted, booths and stages for ^{Disorderly} rope dancers, mountebanks, and the like, are public nuisances, and ^{inns, etc.} may therefore be indicted. 1 Russ., 298.

1st. Of Inns.

It seems to be agreed that the keeper of an inn may, by the common law, be indicted and fined as being guilty of a public nuisance, if he usually harbor thieves, or persons of scandalous reputation, or suffer frequent disorders in his house, or take exorbitant prices, or set up a new inn in a place where there is no manner of need of one, to the hindrance of other ancient and well governed inns, or keep it in a place in respect of its situation, wholly unfit for such a purpose. And it seems also to be clear that if one who keeps a common inn, refuse either to receive a traveller as a guest into his house, or to find him victuals or lodging, upon his tendering him a reasonable price for the

same, he is not only liable to render damages to the party in an action but may also be indicted and fined at the suit of the king; and it is also said that he may be compelled by the constable of the town to receive and entertain such a person as his guest; and that it is in every way material whether he have any sign before his door or not, if he make it his common business to entertain passengers.—Ib.

The keeping of an inn is no franchise, but a lawful trade, which is not exercised to the prejudice of the public; and therefore there is no need of any license or allowance for such erection. But if an inn be the trade of an ale-house, as almost all inn-keepers do, it will be within the statutes made concerning ale-houses.—Ib.

2d. Of Bawdy Houses.

It is clearly agreed that keeping a bawdy house is a common nuisance, as it endangers the public peace, by drawing together dissolute and debauched persons; and also has an apparent tendency to corrupt the manners of both sexes, by such an open profession of lewdness. And it has been adjudged that this is an offence of which a female covert may be guilty, as well as if she were sole, and that she, together with her husband, may be convicted of it; for the keeping of a bawdy house does not necessarily import property, but may signify that absence of government which the wife has in a family as well as the husband, and in this she is presumed to have a considerable part, as those matters are usually managed by the intrigues of her sex. If a person be only a lodger, and have but a single room, yet if she make use of it to accommodate people in the way of a bawdy house, it will be as much the keeping of a bawdy house, as much as if she had a whole house. But an indictment cannot be maintained against a person for being a common bawd, and procuring men and women to meet together to commit fornication; the indictment should be for keeping a bawdy house. For the bare solicitation of chastity is not indictable, but cognizable only in Ecclesiastical Courts.—Ib.

Keeping such houses are also offences against certain statutes, which, see titles Bawds and Gaming.

DISTRESS.

[See LANDLORD AND TENANT.]

What is.

Is the taking of a personal chattel out of the possession of a wrongdoer, into the custody of the party injured, or of an officer of the law.

o procure a satisfaction of the wrong committed, or the payment of penalty, and it lies either for cattle trespassing, or for non-payment of rent, or for penalties under certain statutes.

1st. For what causes a distress shall be.

Distress for rent must be, for rent in arrear; therefore it may not be made on the same day on which the rent becomes due; for if the rent is paid in any part of that day, whilst a man can see to count money, the payment is good. Rent in arrear.

It must not be after tender of payment; for if the landlord come to distrain the goods of his tenant for rent behind, before the distress, the tenant may upon the land, tender the arrearages; and if after that a distress be taken, it is wrongful; and if the landlord have distrained, if the tenant, before the impounding thereof, tender the arrearages, the landlord ought to deliver the distress, and if he doth not, the detainer is unlawful. Even so it is, in case of a distress for damage feasant, (or damage done by cattle trespassing) the tender of amends before the distress maketh the distress unlawful; and after the distress, and before the impounding, the detainer unlawful. 2 Inst., 107. After tender.

But in this case, although the owner tender sufficient amends, yet he cannot take his beasts out of the pound, if the amends be refused; but he must replevy; and if it be found at the trial that the amends were not sufficient, the person on whom they trespassed shall have damages; if the amends tendered were sufficient, then the owner of the beasts shall have damages. Dr. and St., 112.

On a parol demise or verbal lease, where the quantum of the rent agreed upon can appear in certain, the landlord may distrain. But as there are often difficulties, when the agreement is not by deed, the landlord, in such case, may recover a reasonable satisfaction in an action on the case, for the use and occupation of the lands. And if on the trial, any parol demise, or any agreement (not being by deed) whereon a certain rent was reserved, shall appear, the plaintiff shall not therefore be nonsuited, but may make use thereof as an evidence of the quantum of the damages to be recovered. 11 Geo. 2, c. 19, § 14. Although this statute is not of force here, the same mode of proceeding would be allowed in our Courts. Parol lease.

Persons having rent in arrear, upon any lease determined, may distrain for such arrears after the determination of the lease, in the same manner as if it had not been determined. Provided, that such distress be made in six calendar months after the determination of such lease, and during the continuance of such landlord's title or Lease ended.

interest, and during the possession of the tenant from whom such arrear became due. 8 An., c. 14, s. 6, 7.

Holding over. All tenants, whether for life or years, by sufferance or at will, or persons coming in under or by collusion with them, who shall hold over after the legal determination of their estates, after demand made in writing for delivering possession thereof, by the person having the reversion or remainder therein, or his agent, such tenant or other person, holding over for the space of six months after such demand shall forfeit double the value of the use of the premises, recoverable by action of debt or other legal action, or by distress, as in cases of rent reserved and payable quarter yearly. A. A., 1808.

Notice to quit.

In case any tenant shall give notice in writing, of his intention to quit the premises, and shall not accordingly deliver up the possession, at the time in such notice contained, the said tenant, his executors or administrators, shall pay to the landlord double the rent which he would otherwise have been liable to pay, which shall be recovered in manner aforesaid. *Provided, nevertheless*, that nothing herein contained shall be construed to give such tenant a right to discontinue or determine his tenancy by such notice, in any other manner than according to the laws heretofore existing.—Ib.

Second distress.

And where a distress is made by virtue of a warrant of a justice of peace in nature of an execution, the distress may be renewed, if insufficient at first; for a man may mistake the value of the goods seized, or their value may be uncertain or imaginary, or the person making the distress may barely take what he thinks enough, through tenderness and moderation; and it is better for the owner that he should have the liberty of seizing again, for if he is to be precluded from making up the deficiency, he will certainly take care not to seize too little at first. Bur., 589.

2d. *What goods may be distrained, and what not.*

Distress for rent must be of a thing whereof a valuable property is in some body; and therefore dogs, bucks, conies and the like, that are *feræ naturæ*, cannot be distrained. 1 Inst., 47.

Property in use.

Although it be of valuable property, as a horse, yet when a man or woman is riding on him, or an axe in a man's hand, cutting wood, and the like, they are for that time privileged, and cannot be distrained. 1 Inst., 47.

But it is said, that if one be riding upon a horse, damage feasant the horse may be led to the pound with the rider upon him. 1 Sid. 440, 442.

And it hath been held, that horses joined to a cart, with a man upon it, cannot be distrained for rent, (although they may for damage feasant) but both cart and horses may, if the man be not upon the cart. 1 Vent., 36.

Valuable things shall not be distrained for rent, for benefit of trades, ^{In the way of trade.} and which are there by authority of law; as a horse in a smith's shop shall not be distrained for the rent of the shop, nor a horse in a hostry, nor the materials in a weaver's shop for making of cloth, nor cloth or garments in a tailor's shop, nor sacks of corn or meal in a mill, nor any thing distrained for damage feasant; for it is in the custody of the law, and the like. 1 Inst., 47.

It has also been determined by the Court of Common Pleas, in this State, that a negro boy slave, apprenticed to a hair dresser, was not liable to be distrained for rent. May term, 1791.

Furnaces, cauldrons, or other things fixed to the freehold, or the ^{Furnaces, money, etc.} doors or windows of a house, or the like, cannot be distrained. 1 Inst., 47. Things for which a replevin will not lie, so as to be known again, as money out of a bag, cannot be distrained. 2 Bac. Abr., 109.

But money in a bag, sealed, may be distrained; for that the bag sealed may be known again.

By the 2 W. Ses., 1, c. 5, persons having rent arrear, on any demise, lease, or contract, may seize and secure any sheaves, or cocks of corn, or corn loose or in the straw, or hay being in any ^{Corn, etc.} barn or granary, or upon any hovel, stack or rick, or otherwise upon any part of the land charged with rent, and may lock up or detain the same, in the place where found, in the nature of a distress, so as the same be not removed to the damage of the owner, out of the place ~~where~~ found and seized, but be kept there (as impounded) till replevied or sold. S. 3.

Generally, whatever goods and chattels the landlord finds upon the ^{Goods on the premises.} premises, whether they in fact belong to the tenant or a stranger, are distrainable by him for rent; for otherwise, a door would be opened to infinite frauds upon the landlord; and the stranger hath his remedy over by action on the case, against the tenant, if by the tenant's default the goods are distrained, so that he cannot render them when called upon. 3 Black., c. 1, p. 8.

But on particular circumstances, perhaps a Court of equity may ^{Sheep in pasture.} relieve, as in the case of Fowkes and Joyce; T. 1 W. In the common pleas, a person driving sheep to London to sell, by agreement with a master of an inn, put them into ground at so much a score for

a night: the landlord seeing them, asked whose they were, b consented to their staying there, and afterwards distrained them, f rent due to him from the master of the inn, and it was adjudged f the landlord. 3 Lev., 260; 2 Ventr., 50.

But in the same case, upon a bill for relief in equity, the lor commissioners seemed to think, that grounds lying to the inn, a used therewith, ought to have the same privilege as the inn bath, a that passengers' cattle ought not to be distrainable there. 2 Verri 129. And it appeared in this case, that on the landlord's comin and seeing the sheep, he pretended to be angry; upon which t owner offered to take out the sheep, at which time they were n distrainable for the rent, having not been *levant* and *couchant*; (th is, having not so long remained upon the ground as to have la down, and risen up again, to feed,) so that the Court looked on tl consent as a fraud, to get them to be left all night, by which th became liable to the distress: and it was decreed that the landlo should answer for the value of the sheep, and pay costs, both in la and equity. Prac. Chan., 7.

Goods at
vendue.

Another exception has been made likewise, by the Courts in th State. In August, 1790, Himeli replevied some goods which he h sent to Cohen, a vendue-master, to dispose of for him at public auctio and which had been seized for house rent by Wiatt and Richardson the Court resolved, that goods lodged with such an intent in a vend master's store, were not liable to distress for rent.

Cattle
trespassing.

Where a stranger's beasts escape into the land, they may be di trained for rent, though they have not been *levant* and *couchan* provided they are trespassers; but if the tenant of the land is i default, in not repairing his fences, whereby the beast came into tl land, the landlord cannot distrain such beasts, though they have ~~be~~ *levant* and *couchant*, unless he have caused notice to be given to tl owner, and the owner suffers them to remain there afterward Lutw., 364.

In case of rent reserved upon a lease for years, the landlord cann distrain such cattle, until they be *levant* and *couchant*; for if the lan lord had had the lands in his own hands, he ought to have repaired tl fences; and when he puts in a lessee, he ought, by covenant, to oblig him to repair; and therefore in that case, if the law would allow tl landlord to distrain the cattle of a stranger, which come in by escap before that they be *levant* and *couchant*, it would be in effect to allo a man to take advantage of his own wrong. Therefore if the catt come in, by default of the owner of the cattle, then they may be di

trained before they be *levant* and *couchant*; and if in default of the tenant of the land, there they cannot be distrained, until they have been *levant* and *couchant*; that is to say, for rent upon leases for years. And in such case, the landlord shall not take the cattle before he has given notice to the owner, that they are upon the land liable to his distress; and if he doth not come to take them away, then they become distrainable. And by Treby, C. J., where the cattle escape accidentally, they are not distrainable until they have been *levant* and *couchant*; but if they escape by default of their owner, they are distrainable the first minute.—Ib.

By Act of 1800, 7th S. L., 435, no slave shall be liable to be dis- Slave of another not liable. trained, or shall at any time be distrained for house rent, or any other rent, unless such slave shall bona fide belong to such person as may be liable to, or chargeable with, such rent.

Of which it has been held, that a slave, under mortgage, may not Nor one mortgaged. be distrained for rent; Trescott vs. Smith, 1 Mc. Ch., 486.

The Act of 1823, exempting certain articles of debtors from levy Articles exempt. and sale, (for which see Execution,) includes as well levies and sales under distress warrants for rent, as under executions; Caulfield vs. McAlliston, 4 Mc., 378.

3d. At what time the distress shall be taken.

For rent, the landlord cannot distrain in the night, but in the day Not in the night. time; but for damage feasant, one may distrain in the night; otherwise it may be, the beasts will be gone before he can take them. 1 Inst., 142.

If a man come to distrain, and see the beasts in his soil, and the owner chase them out, of purpose, before the distress taken, yet the If beasts escape. owner of the soil cannot distrain them; if he doth, the owner of the cattle may rescue them, for the beasts must be damage feasant at the time of the distress. 1 Inst., 161.

Before sun rising or after sun set, no man may distrain, but for damage feasant. Mirrour, c. 2, sect. 28.

And if any tenant for life, years, at will, sufferance or otherwise, Goods removed. shall fraudulently or clandestinely convey off the premises, his goods or chattels, to prevent a distress, the landlord, or any person lawfully empowered by him, may in five days next after such conveying away, seize the same wherever they shall be found, and dispose of them in such manner as if they had been distrained on the premises. § 2.

4th. That reasonable distress shall be taken.

Distresses shall be reasonable, and not too great; and he that

taketh great and unreasonable distresses, shall be grievously amerced 52 H. 3, c. 4.

For example; if the lord distrain two or three oxen for 12*d.*, or like small sum, and the owner bring a replevy of the oxen, and the lord avow the taking of them for the 12*d.* of his own showing, he shall make fine, or the party may have his action upon this statute. Inst., 107.

If the lord distrain an ox or a horse, for a penny, if there were other distress upon the land holden, the distress is not excessive; if there were a sheep, or a swine, or the like, then the taking of ox or horse is excessive, because he might have taken a beast of value. 2 Inst., 107.

The remedy for excessive distresses is by a special action on statute of Marlbridge; for an action of trespass is not maintainable on this account, it being no injury at the common law. 3 Black. Com.

5th Manner of making Distress.

Not to break doors or gates. Gates or enclosures may not be broken open, nor thrown down to make a distress. 1 Inst., 161.

Nor may the lessor enter into the tenant's house, unless the doors are open. Read, Distr., 3 Bac. Abr., 111.

Upon a question, about taking a distress, it was held by the chief justice Hardwicke, at the summer assizes at Exeter, 1735, that a padlock put on a barn door could not be opened by force, to take the corn by way of distress. Vin. Distr., (E. 2.) 6.

But if the outer door of an house is open, one may break an inner door to take a distress. *Cases in the time of Lord Hardwicke*, 1

If a landlord comes into a house, and seizes upon some goods, as a distress, in the name of all the goods of the house, that will be a general seizure of all. 6 Mod., 215.

6th. Distress how to be demeaned.

Not taken out of the county.

By the 52 H. 3, c. 4; none shall cause any distress that he has taken, to be driven out of the county where it was taken; and if a neighbour do so to another, of his own authority, (as for damage sustained, or rent charge, 2 Inst., 106,) he shall make fine, as for a trespass done against the peace; and if the lord so presume, to do so against the tenant, he shall be grievously punished by amercement.

Before this act, at the common law, a man might have driven a distress to what county he pleased, which was mischievous, for several causes; 1st. Because the tenant was bound to give the beasts, being impounded in an open pound, sustenance, and being carried into a

her county, by common intendment, he could have no knowledge where they were: 2d. He could not know where to have a replevy, but the party was before this statute driven to his action upon his case. 2 Inst., 106:

Cattle distrained may not be worked or used, unless for the owner's benefit, as a cow milked, or the like; much less may they be abused or hurt. Cro. Jac., 148. Nor used.

7th. Of rescous and pound breach.

By the common law, if a man break the pound, or the lock of it, or part of it, he greatly offendeth against the peace, and doth trespass to the State, and to the sheriffs in breach of the peace, and to the party, and to the delaying of justice; and therefore hue and cry is to be levied against him, as against those who break the peace. Mir. c. 2, s. 26. And the party who distrained, may take the goods again, wheresoever he shall find them, and impound them again. 1 Inst., 47. At Common Law.

And by statute, on any pound breach, or rescous of goods distrained for rent, the person grieved thereby, shall, in a special action upon the case, recover treble damages, and costs against the offender, or against the owner of the goods, if they be afterwards found to have come to his use or possession. 2 W. c. 5, s. 4. By statute.

In the case of Sir Wilfred Lawson vs. Story, M. 6 W. It was adjudged that the costs shall be trebled, as well as damages. L. Raym., 20.

When a man hath taken distress, and the cattle distrained, as he is driving them to the pound, go into the house of the owner; if he that took the distress demand them of the owner, and he deliver them not, this is the rescous in law. 1 Inst., 161.

8th. Replevying the distress.

All writs of replevin shall be returnable immediately, and it shall be the duty of the respective sheriffs in whose offices they shall be lodged, to make return thereof accordingly. A. A., 1808. Writs returnable at once.

The plaintiff or plaintiffs in all actions of replevin, shall be bound to declare, within one month from the lodgement of the writ in the sheriff's office, without any rule or notice for that purpose; and on failure of the sheriff to make return thereof, within the period aforesaid, the plaintiff or plaintiffs is or are hereby authorized to substitute the same as in cases of loss; and in case the said plaintiff or plaintiffs shall not declare within the period aforesaid, the defendant or defendants shall be at liberty to enter up judgement of *non pross.*, and proceed as in such case is provided by law.—Ib. Declaration.

Bond. And the sheriff, or other officer having authority to grant replevin, shall, in every replevin of a distress for rent, take, in his own name, from the plaintiff, and two sureties, a bond in double the value of the goods distrained, to be ascertained on the oath of one witness, and conditioned for prosecuting the suit with effect, and without delay, and for duly returning the goods distrained, in case a return shall be awarded, before any deliverance be made of the distress; and the sheriff shall assign such bond to the avowant, or person making consuance. 11 G. 2, c. 19, s. 23.

Liability of surety. In all cases of replevin, the security given by the plaintiff shall be bound and obliged, not only for the return of the goods distrained, but also in case the said goods shall be insufficient to satisfy the rent for which the distress is made, or in case the same shall be eloigned, for the full amount of the rent for which the distress shall be made, and all costs of suit which may be adjudged against the plaintiff in the action; and it shall be the duty of the sheriff executing the writ of replevin, to take bond and security according to law, for such amount as shall be sufficient to cover all such sums. A. A., 1808.

9th. Sale of the Distress.

In five days. Where any goods shall be distrained for rent, upon lease or contract, and the tenant or owner of the goods distrained, shall not, within five days after such distress taken, and notice thereof, (with the cause of such taking) left at the chief mansion house, or other most notorious place on the premises, replevy the same; in such case, the person distraining shall, with the constable of the parish or place where such distress shall be taken, cause the goods or chattels so distrained to be appraised by two appraisers, sworn to appraise the same truly, according to the best of their understandings; and after such appraisement, shall sell the same for the best price can be gotten for them, for satisfaction of the rent, and charges of the distress; leaving the overplus, if any, with the constable for the owner's use. 2 W. sess., 1 c. 5.

10th. Case of tenant holding over.

By the 8 Ann., c. 14. Whereas, tenants *pour autre vie* (that is, holding during the life of another person,) and lessees for years, or at will, frequently hold over after the determination of the lease; and whereas, after the determination of such, or other leases, no distress can be made for arrears of rent, that grew due on such leases, before the determination thereof; it is therefore enacted, that it shall be lawful to distrain after the determination of such lease, in the same manner as if it had not been determined; provided that the distress be

made within six calendar months after the determination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom such arrear became due. S. 7.

A lease at will is understood to be for a year certain; and if a tenant takes from year to year, either party must give reasonable notice before the end of the year; which reasonable notice varies according to the custom of different countries. Burr. Reports, 1609.

11th. Rent in case of an execution.

By the 8 Ann., c. 14; no goods being on any messuage, lands, or tenements leased for life, term of years, at will, or otherwise, shall be liable to be taken by execution, unless the party at whose suit the execution is sued out, shall, before the removal of such goods from the premises, pay to the landlord, or his bailiff, all such rent as shall be then due, for the premises; provided, that it amount not to more than one year's rent; and if the arrears shall exceed one year's rent, then the party paying such landlord one year's rent, may proceed to execute his judgement. S. 1.

Goods not to be taken until rent paid.

And in case of two executions, there shall not be two year's rent paid to the landlord; for the intent of the act was to reserve to the landlord only the rent for one year; and it was his own fault if he let the rent run in arrear; therefore one year's rent to the landlord being paid to him on the first execution, the sheriff is not to levy, for him again, any thing on a subsequent execution. Str., 1024.

a landlord does not distrain, himself in person, he should empower a constable to levy by distress, as follows:

Know all men by these presents, that I, A. B., do hereby authorise and appoint B. C., to take any person or persons to his assistance, and enter into the house (or plantation) of C. D., and there to make distress of all such goods and chattels as are upon the premises, for _____ pounds, for one quarter's rent (or one year's rent, as the case is) due to me, on _____ and after the said goods are so distrained, if the said C. D. doth not, within the time limited in the statute for that purpose made, replevy the same, or pay the said rent, then and in such case, I do hereby authorise you to cause the said goods to be appraised, sold and applied, as by the said act is directed; and for your so doing, this shall be your warrant. Witness my hand and seal, this _____ day of _____ in the year _____

A. B. [L. s.]

When the goods are distrained by virtue of the above power, the

constable or attorney employed, should immediately order them to be locked up in one of the rooms of the house, or removed off the premises, as shall be thought most safe, first taking an inventory, which must be entitled in this manner :

Inventory. An inventory of the several goods that were seized and distrained by me, whose name is underwritten, in the house (or plantation) of in street, in Charleston, (or any other place) by an authority of to me for that purpose given, for pounds, for one quarter's (or one year's) rent, due on the day of which goods were seized the day of instant, for the use of the said

Imprimis, in the cellar, &c.

In the lower rooms, &c.

In the upper rooms, &c.

In the kitchen, &c.

This inventory must be signed by the appraisers, and by the constable or other person employed.

— } Sworn appraisers.
— }
— } Constable.

Together with the copy of the above inventory, the tenant must receive the following note :

Notice.

A. T.,

Take notice, that by the authority, and on the behalf of your landlord, A. L., I have this day of in the year distrained the several goods and chattels specified in the schedule annexed, in your houses, out-houses, and grounds, at for pounds arrear of rent due to him, the said A. L.; and if you shall not pay the said rent so due, and in arrear as aforesaid, or replevy the said goods and chattels, I shall, after the expiration of five days from the date hereof, cause the said goods and chattels to be appraised and sold, according to the statute, in that case made and provided. Given under my hand, the day and year first above written.

A. D.

Witness, that a copy hereof was this day delivered to the said A. T., (or left at the chiefmansion-house of the said A. T.)

A. W.

Appraiser's Oath.

You, and each of you, shall well and truly appraise the goods and chattels mentioned in this inventory, according to the best of your understanding : So help you God.

Form of the Appraisalment.

The appraisalment may be in the form of the inventory, specifying the particulars, and their respective valuation, and then add at the end:

Appraised by us, this day of in the year

A. P. }
B. P. } Sworn appraisers.

N. B. *The person distraining, must take care to keep a copy of the inventory, appraisalment and notice.*

Landlords should always take care to get the tenant to acknowledge the terms of his tenure, in presence of witnesses, or else reduce the terms into writing.

D O G S .

A mastiff going into the street unmuzzled, from the ferocity of his ^{Going at large.} nature, being dangerous and a cause of terror to the citizens of the State, seemeth to be a common nuisance, and consequently, the owner may be indicted for suffering him to go at large.

If a man has a dog that kills sheep, this is not a public nuisance, ^{Killing sheep.} but the owner of the dog (knowing thereof) is liable to an action; but if he is ignorant of such quality, he shall not be punished for this killing: and in an action upon the case for such killing, the plaintiff shall be required to prove in evidence, that the dog had used to kill sheep. *Dyer, 25; Het., 171.*

And in order to maintain an action for biting by the defendant's ^{Biting.} dog, it must be proved also, that he knew his dog to be used to bite; but one instance is sufficient in that case. 12 Mod., 555.

And if a man keeps a dog accustomed to bite sheep, and he knows it, and notwithstanding he keeps the dog still, and afterwards the dog bites an horse, this shall be actionable, although he had been known before to bite sheep only; because the owner, after notice of the first mischief, ought to have destroyed or hindered him from doing any more hurt. *Ld. Raym., 110.*

D R U N K E N N E S S .

1st. How far an excuse for crime.

With respect to a person *non compos mentis* from drunkenness, a species of madness which has been termed *dementia affectata*, it is a

settled rule, that if the drunkenness be voluntary, it cannot excuse man from the commission of any crime, but on the contrary, must be considered as an aggravation of whatever he does amiss. Yet if person, by the unskillfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causes frenzy, this puts him in the same condition with any other frenzy, and equally excuses him; also, if by one or more such practices, an habitual or fixed frenzy be caused, though this madness was contracted by the vice or will of the party, yet the habitual and fixed frenzy caused thereby puts the man in the same condition as if it were contracted at first involuntarily. And, though voluntary drunkenness cannot excuse from the commission of crime, yet where, as upon a charge of murder, the material question is, whether an act was premeditated, or done only with sudden heat and impulse, the fact of the party being intoxicated, has been holden to be a circumstance proper to be taken into consideration. 1 Russell, p. 8.

Not if
voluntary.

By others.

If frenzy be
fixed.

Where
malice is in
question.

2d. How Punished.

Persons
found drunk.

By Act of 1691, 2d S. L., p. 69; and whereas, the odious and loathsome sin of drunkenness hath of late grown into common use within this province, being the root and foundation of many other enormous sins; *Be it therefore enacted*, that every person and persons that shall be found drunk, shall forfeit the sum of five shillings for every such offence.

D U E L L I N G

Definition.

Is the fighting between two persons by agreement, upon some quarrel precedent. 1 Tomlins, 589.

1st. Of the offence at Common Law.

If either party in a duel be killed, the other principal and second are guilty of murder, and this, whether the seconds fight or not. 1 P. C., 47, 51.

When
killing by,
murder.

If two persons quarrel over night, and appoint to fight the next day, or quarrel in the morning, and agree to fight in the afternoon, or some considerable time after, by which it may be presumed the blood was cooled, and they meet and fight a duel, and one kill the other, it is murder. 3 Inst., 52; H. P. C., 48; Kel., 66. And whenever

appear that he who kills another in a duel, or fighting on a sudden quarrel, was master of his temper at the time, he is guilty of murder; as if after the quarrel, he fall into another discourse and talk calmly thereon, or alledge that the place where the quarrel happens, is not convenient for fighting; or that his shoes are too high if he should fight at present, &c. Kel., 56; 1 Lev., 180.

If one *challenge* another, who refuses to meet him, but tells him that he shall go the next day to such a place about business, and then the challenger meets him on the road and assaults the other; if the other in this case kill him, it will be only manslaughter; for there is no acceptance of the challenge or agreement to fight; and if the person challenged refuseth to meet the challenger, but tells him that he wears a sword, and is always ready to defend himself, if then the challenger attack him and is killed by the other, it is neither murder nor manslaughter, if necessary in his own defence. Kel., 56. Where challenge is not accepted.

If one kill another in a deliberate duel, under provocation of charges against his character and conduct, however grievous, it is murder in him and his seconds; and therefore the bare incitement to fight, though under such provocation, is in itself a very high misdemeanor, though no consequence ensue thereon against the peace. 3 East's Rep., 581. Under charges against character.

An endeavor to provoke another to commit the misdemeanor of sending a challenge to fight, is itself an indictable misdemeanor, particularly where such provocation is given by a writing, containing libellous matter, and alledged to have been done with intent to do the party bodily harm, and to break the king's peace; the sending such writing being an act done towards procuring the commission of the misdemeanor, meant to be accomplished. 6 East's Rep., 464. Endeavor to provoke.

2d. Of Statutory Offence.

By Act of 1812, 5th S. L., 671, as altered and repealed by Act of 1834, 6 S. L., 515; if any person or persons, resident in, or being a citizen of this State, shall fight a duel, or shall give or accept a challenge to fight a duel, within this State, or shall cause any such challenge to be sent, given or accepted, within this State, or within the limits of the United States, his or their seconds, and all and every other person or persons directly or indirectly concerned in fighting any duel, or sending, giving, accepting, or carrying, or conveying any such challenge, their counsellors, aiders and abettors, upon being thereof convicted in any Court having jurisdiction, shall be imprisoned for a term not exceeding twelve months, and a fine not exceeding two Duelling prohibited.

thousand dollars. Provided, however, that in case any death shall happen in consequence of any duel, this act shall not be so construed as to save the offenders from the pains and penalties of the laws of the land, provided for the punishment of homicide.

One concerned may give evidence without criminating himself.

By Act of 1823, 6th S. L., 208; that from and after the passing this act, upon the trial of all indictments for duelling, which shall hereafter be prosecuted in this State, any person concerned therein either as principal or second, or as counselling, aiding and abetting such duel, shall and may be compelled to give evidence against the person or persons actually indicted, without criminating himself, subjecting or making himself liable to any prosecution, penalty, forfeiture or punishment, on account of his agency in such duel; and every case where two or more persons shall be charged in any indictment for fighting a duel, or being concerned therein, either of such persons may be used as a witness or witnesses in behalf of the State by having his or their names stricken out of the indictment, or otherwise, at the direction of the attorney general or solicitor conducting such prosecution, of which an entry shall immediately be made on the minutes of the Court; and in case any such person or persons so used as witness or witnesses, in behalf of the State, in any prosecution for fighting a duel, or for being concerned therein, shall afterwards be indicted for the same offence, the fact of his or their being used as witness or witnesses on the former prosecution for the same offence shall and may be pleaded in bar to such subsequent indictment, and on proof thereof, by competent evidence, such person or persons shall be thereof acquitted and discharged.

Challenge to fight in another State.

Under which it has been held, that a challenge delivered in this State to fight a duel in Georgia, is a breach of the law of this State against duels, and is indictable here. *State vs. Taylor*, 1 Tr. R., 10

Sudden challenge.

A verbal challenge upon sudden controversy, and though given without the intervention of a second, is an offence against the act of 1812. *State vs. Strickland*, 2 N. & Mc., 181.

Precedent.

1. *Warrant.*

STATE OF SOUTH-CAROLINA, }
District. }

By _____, magistrate, in and for the said State.
To any lawful Constable.

Whereas, it appeareth to me, upon the oath of _____, that (the names of the principals.) (State here the acts done by them,) a

that (the names of the others concerned therein,) were engaged therein, (as seconds,) or (by causing a challenge,) or as (counsellors and abettors.)

These are, therefore, to command you to apprehend the said named persons, to bring them before me, to be dealt with according to law.

Given under my hand and seal, at , this day of , one thousand eight hundred and

A. B., [L. s.]
Magistrate:

2d. Recognizance.

Observe that if either party be killed in duel, the punishment of the other principal and seconds is death, without benefit of clergy, and in such case, a magistrate may never admit to bail. Observe also, that the greatest extent of the fine being two thousand dollars, the recognizance, according to act of 1839, must not be for less than that amount.

THE STATE OF SOUTH-CAROLINA.

Be it remembered, that on the day of in the year of our Lord one thousand eight hundred and personally appeared before me, magistrate, in and for the said State, who acknowledged themselves indebted to the State of South Carolina, that is to say, the said in the sum of two thousand dollars, and the said in the sum of two thousand dollars, like money, to be levied of their separate lands and tenements, goods and chattels, respectively, to and for the use of the State, if the above mentioned shall fail in the performing the condition underwritten.

The condition of this recognizance is such, that if the said shall personally appear before the Court of General Sessions, to be holden at the usual place of judicatures in on the Monday in then and there to answer to a bill of indictment, to be preferred against him, (for fighting a duel) or (for giving or sending a challenge to fight a duel, within this State,) or (for accepting a challenge to fight a duel within this State,) or (for causing a challenge to fight a duel, to be given or sent within this State,) or (for causing a challenge to fight a duel, to be accepted within this State,) or (for being concerned in any of the above,) or (for carrying or conveying a challenge to fight a duel,) or (for committing, aiding and abetting, in any of the above,) and to do and receive what shall be enjoined by the Court, and not to depart the Court without license; and in the meantime, that the said do keep the peace of the

State, and be of good behaviour towards all the citizens thereof, an especially towards the said ; then this recognizance to be null and void, or else to remain in full force and virtue.

Taken and acknowledged the day and }
year above written, before me.

Signed, [L. s.]

A. B., Magistrate. [L. s.]

If it be brought to the notice of a magistrate that two persons are suspected of being about to fight a duel, and good reason be shewn for such suspicion, he should forthwith cause such persons to be arrested and require them to give bonds for the peace.

3. Form of such Recognizance.

Penal Clause, as above.

Condition.

The condition of this recognizance is such, that if the above bound A. B. do keep the peace of the State, and be of good behaviour towards all the citizens thereof, and especially towards C. D., and particularly if he shall not fight a duel, or shall not send, or give, or accept a challenge to fight a duel, within this State, or shall not cause any such challenge to be given, sent, or accepted, within this State or within the limits of the United States, for one year and a day, then the above recognizance shall be null and void, or else to remain in full force and virtue.

Taken and acknowledged the day and }
year above written, before me.

Signed, [L. s.]

A. B., Magistrate. [L. s.]

D U R E S S .

Duress,
what.

2d. Burn., J., p. 57. Duress is where a person is kept in prison or restrained of his liberty, contrary to the order of law, or threatened to be killed, maimed, or beaten: and if such person, so in prison, in fear of such threats, make any specialty or obligation by reason of such imprisonment or threats, such deed is void in law; and in an action brought upon such specialty, the party may plead that it was made by duress, and so avoid the action.—*Cowel*.

Effect on
contract.

Every legal contract must be the act of the understanding, while they are incapable of using, who are under restraint and terrors; and

therefore the law requires the free assent of the parties, as essential to every contract, and that they are not under any force or violence. 2 Bac. Abr., 155.

It seems clearly agreed, that where a person is illegally restrained of his liberty, by being confined in a common jail or elsewhere, and during such restraint, enters into a bond or other security to the person, who causes the restraint, that he may avoid the same for duress of imprisonment.—Co. Litt., 253; Jenk., 166. Bond while under, void.

Lord Coke says, that for menaces, a man may avoid his own act in four instances : for fear of loss of life, loss of member, of mayhem, or imprisonment. 1 Inst., 486.

ELECTIONS.

1st. OF THE OATH, POWERS, AND DUTIES OF MANAGERS.

2d. OF THE QUALIFICATIONS OF VOTERS.

3d. OF OFFENCES AGAINST THE FREEDOM OF ELECTIONS.

1st. *Of the Oath, Powers, and duties of Managers.*

By resolution of December 16, 1833, 1 S. L., 199, managers of elections are required to take an oath or affirmation, "that they will faithfully and impartially carry into execution, the elections in which they may serve, agreeably to the Constitution of the State of South-carolina." Oath.

6th S. L., 94, sec. 1st. From and after the passing of this Act, the managers appointed to conduct elections, to be made by the people, shall be, and they are hereby, authorized and empowered to administer to each other, respectively, the oath or oaths prescribed to be taken before entering on the duties of their appointment. How administered.

By Act of 1831, 6th S. L., p. 443, sec. 1, 2, 3, 4; The managers of elections for members of Congress, of the Legislature, sheriffs, clerks, and all other district officers, and also for the Intendant and wardens of the city of Charleston, and also the officers of all incorporated towns in this State, shall have authority to administer oaths, to examine witnesses in all matters concerning the duties of their appointment, and to maintain regularity and order at their respective offices; and if any person shall refuse to obey the lawful commands of managers, while in the execution of their duties, or by disorderly conduct in their presence or hearing, shall disturb their proceedings, Powers of managers of elections. Administer oaths.

Commit
disorderly
persons.

Sheriff or
constable to
obey.

Residence
and name of
voter to be
set down.

Oath to be
tendered.

they may, by an order in writing, commit the person so offending to the common jail of the district, during the day of election on which such disturbance is committed; and such order shall be executed by the sheriff, or any constable to whom the same may be delivered; or if none be present, by any other person deputed by the managers in writing; and the sheriff, constable, or other person executing such order, shall be entitled to the same fees as for other arrests, to be defrayed by the party so offending, before his discharge, unless he shall make oath of his inability to pay the same.

It shall be the duty of the managers, in holding an election in the parishes of St. Philip's and St. Michael's, to set down in writing, the particular place of residence, as well as the name, of every voter, and also to designate that the oath was taken, in case such voter was sworn to his qualification.

If any person offering to vote, shall be challenged as unqualified, by a manager, or by any other person entitled to vote, the manager shall declare to the person so challenged, the qualifications of a voter; and if he shall state himself to be duly qualified, and the challenge shall not be withdrawn, the managers, except for the election of Intendant and Wardens of the city of Charleston, and also of the officers of all incorporated towns or villages within this State, shall then tender to him the following oath, if he be a person claiming to be qualified by residence: You do swear, or affirm, that you are a citizen of this State, of the age of twenty-one years, and have resided therein two years previous to this election; that you are now a resident of this district or parish, and have been a resident therein for the last six months; that you are not a pauper, soldier or non-commissioned officer of the army of the United States, and that you have not voted at this election." If the person offering to vote, does not claim to be qualified by residence, the managers shall tender to him the following oath: "You do swear that you are a citizen of this State of the age of twenty-one years, and have resided therein two years previous to this election; that you have a freehold of fifty acres of land, or a town lot, in this district or parish, and that you have been legally seized and possessed of the same lot for the last six months; that you are not a pauper, non-commissioned officer or soldier of the army of the United States, and that you have not voted at this election.

And if any person shall refuse to take the oath so tendered, or if the managers shall otherwise be satisfied that he is not qualified, his vote shall be rejected.

The managers to whom writs of election are addressed, in case of election for members of Assembly, are required to give public notice in writing of such election, two Sundays before the appointed time of election, at the door of the Church, or some other public place, as shall be appointed in said writ; and said election shall be held upon the same days at all places, where elections are appointed. Act 1721, 3 S. L., 135; also p. 436, secs. 4th and 5th.

And for preventing frauds in all elections as much as possible, *it is hereby enacted*, by the authority aforesaid, that the names of the electors for members of the Commons House of Assembly, shall be fairly entered in a book or roll, for that purpose provided by the churchwardens, or other persons appointed for managing elections, to prevent any person's voting twice at the same election; and the manner of their voting shall be as hereinafter directed, that is to say, each person qualified to vote, as is above directed, shall put into a box, glass, or sheet of paper, prepared for the purpose by the said churchwardens, or other persons, as is above directed, a piece of paper rolled up, wherein is written the names of the Representatives he votes for, and to which paper the elector shall not be obliged to subscribe his name; and if, upon the scrutiny, two or more papers, with persons written thereon for members of Assembly, be found rolled up together, or more persons names be found written in any paper than ought to be voted for, all and every such paper or papers shall be invalid and of no effect; and that those persons, who, after all the papers and votes are delivered in, and entered as aforesaid, shall be found (upon scrutiny made) to have the majority of votes, are, and shall be deemed and declared to be members of the succeeding Commons House of Assembly, so as they be qualified as is hereinafter directed.

And be it further enacted, by the authority aforesaid, that the said election shall not continue longer than two days, and that the said elections shall begin at nine in the morning, and end at four in the evening; and that at adjourning of the poll, at convenient hours, in the time of the aforesaid election, the churchwardens, or other persons as aforesaid, impowered to manage the said elections, shall seal up the said box, glass or paper, wherein are put all the votes, then delivered in, and rolled up by the electors as aforesaid, with their own seals, and the seals of any two or more of the electors that are then present; and upon opening the poll, shall unseal the said box, glass or paper, in the presence of the said electors, in order to proceed in the said election.

Notice of election, how given, in case of clerk, etc.

By Act of 1839, sec. 1; Wherever a vacancy is about to occur in the office of Clerk, Ordinary, or Sheriff, in any district in this State, by expiration of the term of the incumbent, it shall be the duty of the acting Clerk of the Court of Common Pleas, at least two months before the term when such vacancy shall happen, to advertise an election to fill such vacancy at the Court House door, at five other public places in the district at least, and in a newspaper, if any such be printed in the district, giving thirty days' notice of the time of such election, and specifying any Monday succeeding the expiration of thirty, and before the expiration of sixty days, as the day of election; and he shall also issue a notice, to be served by the acting Sheriff, to the several sets of managers of elections in the district, to attend at their respective polls on the day appointed, who shall so attend, and open them between the same hours; and in other respects, the election shall be conducted in like manner, as is prescribed for the election of members of either branch of the Legislature. For every instance in which the Clerk shall render the services herein required of him, he shall be entitled, upon making satisfactory proof thereof to the treasurer of his division, to receive from the public treasury ten dollars.

Vacancies, how filled.

When any vacancy shall occur in either of the offices aforesaid, by the death, resignation, removal from the district or State, removal from office of the incumbent, or by the death, omission or refusal to qualify, within the time prescribed, of any officer elect, or by the lunacy of the incumbent, ascertained by inquisition found, it shall be the duty of the acting Clerk aforesaid to advertise for an election, and to issue notice to the managers aforesaid, who shall conduct the election as prescribed in the first section of this Act. If the Clerk shall fail to advertise and give the notice herein required, the managers of elections shall nevertheless proceed to advertise and hold an election as hereinbefore directed; and the Clerk, for every wilful neglect herein, shall be liable to indictment and punishment, as for a high misdemeanor.

Proceedings on failure of election.

Whenever two candidates, for either of the offices aforesaid, may have the same number of votes, or when an election herein directed, shall be declared void by the managers, they shall forthwith advertise and conduct another election, in the same manner as is prescribed in the first section of this Act.

Managers to count the votes, declare election, etc

The managers shall meet at the Court House of their district, on the Wednesday after the votes are received; and on the same day count out the same, declare the election, if no notice of intention to

contest it be given, and shall certify to the Governor the name of the person who may be duly elected.

If any person desire to contest any election herein provided for, he shall, on the day the votes are counted and the election declared, furnish to the managers the grounds, in writing, on which he intends to contest the same; and they are hereby authorized and required to hear the matter, and determine, as soon as may be, the validity of the election so in question, and their decision shall be final. *Provided*, That the presence of at least two-thirds of the managers shall be necessary to try the question, and the vote of the majority present, shall be required to determine it; and no manager who has been a candidate, shall be allowed to set upon the hearing and determination thereof.

More of
contesting,
etc.

2d. Of the qualifications of Voters.

By resolutions of 1831, 1st S. L., p. 198; *Resolved*, That every free white man, of the age of twenty-one years, (paupers and non-commissioned officers, and privates of the army of the United States excepted,) being a citizen of this State, and having resided therein two years previous to the day of election, and who has a freehold of fifty acres of land, or a town lot of which he has been legally seized and possessed at least six months before such election, or not having any such freehold or town lot, hath been a resident in the election district, in which he offers to give his vote, before the election, six months, shall have a right to vote for a member or members to serve in either branch of the Legislature, for the election district in which he holds such property or residence.

Two years a
citizen of the
State, and
having
freehold.

Not having
freehold.

Resolved, That the two years residence required by the Constitution in a voter, are the two years immediately previous to the election, and the six months residence in the election district, are the six months immediately previous to the election; but if any person has his home in the State, he does not lose the right of residence by temporary absence, with the intention of returning; and if he has his home in the election district, his right to vote is not impaired by a temporary absence with the intention of returning. But if one has his home and family in another State, the presence of such person, although continued for two years in the State, gives no right to vote.

What is a
residence.

3d. Offences against the freedom of Elections.

By Act of 1831, 6th S. L., p. 443, section 5th; In all indictments for perjury, or subornation of perjury, an oath taken before the managers of any election ordered by law, or by joint resolution

Perjury and
its penalty.

of both branches of the Legislature, in the due execution of their duties, shall be equivalent to an oath taken in a judicial proceeding; and any person convicted of perjury, or subornation of perjury, assigned in taking, or in procuring any person to take a false oath before the managers of elections, shall suffer the pains and penalties prescribed by law for such offences.

Managers may employ two constables for each of the polls.

The managers of election for St. Philip's and St. Michael's, shall be authorized to employ two constables for each of the several polls, who shall each receive for their services the sum of one dollar per day.

Votes not to be purchased.

If any person shall, directly or indirectly offer, give, or engage to pay, any sum of money or other valuable consideration to any other, to induce such other person to procure for him, or for any other person, by his vote, interest, influence, or any other means whatsoever, any office of honor, profit or trust, within this State, or shall offer, give, promise, or bestow, any reward, by meat, drink, money or otherwise, for the aforesaid purpose, and be thereof convicted, he shall forfeit the sum of not less than one hundred, nor more than five hundred dollars, and suffer imprisonment for a term not exceeding six months.

Penalty therefor.

If any person shall accept or receive, directly or indirectly, of another, any money or reward of meat, drink, or other valuable consideration, for procuring or assisting to procure, by his vote, interest or influence, any office of honor, profit or trust within this State, for any other person whomsoever, and be thereof convicted, he shall forfeit the sum of not more than one hundred dollars, and suffer imprisonment at the discretion of the Court, having cognizance of the same; and if such offender be in any office, he shall, on such conviction, be disabled from holding the same.

Informers excused.

If either of the parties, offending as aforesaid, shall give information, upon oath, against the other offending party, and shall duly prosecute such offender, such offender shall be free from the penalties aforesaid.

Offences, where and how punished.

All offences under this act shall be heard, tried and determined before the Court of Sessions and general jail delivery, in the district where such offence is committed, and the pecuniary penalties accruing thereby shall go, one half to the informer, and the other half to the commissioners of public buildings for the district where the offence is committed; and such informer shall be a competent witness, notwithstanding his interest in the event of the prosecution.

If any person shall, at any election whatever, maltreat, assault,

threaten, beat or abuse any voter, with a view to intimidate or control him in the free exercise of his right of suffrage, such offender, on conviction, shall suffer fine and imprisonment, at the discretion of the Court. Voters not to be intimidated.

If any person shall forcibly interrupt any election pending under any law of this State, or shall invalidate, or prevent, or attempt to invalidate or prevent any such election, by breaking up, or removing, or seizing upon, the ballot box or boxes, or shall by any means prevent or deter, or endeavor to prevent or deter, any voter or voters from putting his or their ballot or ballots into the boxes, or shall change or destroy the ballots which have been duly put therein, every person offending in any of the cases aforesaid, shall forfeit the sum of not less than fifty dollars, nor more than two hundred dollars, and shall also suffer imprisonment for a term not exceeding three months. Penalties and offences defined.

ESCAPE.

An escape is, where one that is arrested, gaineth his liberty before he is delivered by course of law. *Terms de la Ley.*

Escapes are of three kinds. 1. By a person who hath the offender in his custody; this is properly called an escape. 2. Caused by a stranger; this is commonly called a rescue. 3. By the party himself, either without force, which is simply an escape, or with force, which is prison-breaking. Rescous and prison-breaking are treated of under their respective titles; and this title treats only of escapes properly so called; concerning which we will observe the following order: Three kinds.

1st. OF ESCAPE BY THE PARTY HIMSELF.

2d. ESCAPE SUFFERED BY A PRIVATE PERSON.

3d. ESCAPE SUFFERED BY AN OFFICER.

4th. WHAT IS A VOLUNTARY AND WHAT A NEGLIGENT ESCAPE.

5th. CONCERNING THE RETAKING OF A PERSON ESCAPED.

6th. PUNISHMENT OF AN ESCAPE.

7th. PRECEDENT.

1. *Of escape by the party himself.*

As all persons are bound to submit themselves to the judgement of the law, and to be ready to be justified by it; whoever in any case refuses to undergo that imprisonment which the law thinks fit to put

upon him, and frees himself from it by artifice, before such time as he is delivered by due course of law, is guilty of an high contempt, punishable with fine and imprisonment. 2 Haw., 122.

But escape committed by the party himself, belongs more properly to the title, prison-breaking.

2. *Escape suffered by a private person.*

It seems to be a good general rule, that wherever any person hath another lawfully in his custody, whether upon an arrest made by himself or another, he is guilty of an escape, if he suffer him to go at large before he hath discharged himself of him, by delivering him over to some other, who by law ought to have the custody of him. 2 Haw., 138.

And the law is generally the same, in relation to escapes suffered by private persons, as by officers. 2 Haw., 138.

3. *Escape suffered by an officer.*

Must be
actual and
justifiable
arrest.

In order to make it an escape, there must be an actual arrest; and therefore, if an officer having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape. 2 Haw., 229.

And as there must be an actual arrest, such arrest must be also justifiable; for if it be either for a supposed crime, where no such crime was committed, and the party neither indicted nor appealed, or for such a slight suspicion of an actual crime, and by such an irregular mittimus as will neither justify the arrest nor imprisonment, the officer is not guilty of an escape, by suffering the prisoner to go at large. 1 Haw., 129.

And as the imprisonment must be justifiable, so it must be also for a criminal offence. 2 Haw., 129.

Detainer
must be
lawful.

Also if a prisoner be acquitted, and detained only for his fees, it will not be criminal to suffer him to escape, though the judgement were, that he be discharged, paying his fees, so that till they be paid, the first imprisonment continued lawful as before; for inasmuch as he is detained, not as a criminal, but only as a debtor, his escape cannot be more criminal than that of any other debtor: yet, if a person convicted of a crime be condemned to imprisonment for a certain time and also till he pay his fees, and he escape after such time is elapsed without paying them, perhaps such escape may be criminal, for that it was part of the punishment that the imprisonment be continued till the fees should be paid: but it seems, that this is to be intended when

he fees are due to others as well as to the jailor, for otherwise the jailor will be the only sufferer by the escape, and it will be hard to punish him for suffering an injury to himself only, in the non-payment of a debt in his power to release. 2 Haw., 129, 130.

Also it is an escape in some cases, to suffer a prisoner to have greater liberty than by the law he ought to have; as to admit a person on bail, who, by law, ought not to be bailed, but to be kept in close custody. 2 Haw., 130.

So if a jailor, or other officer, shall licence his prisoner to go abroad for a time, and to come again; this is an escape, because the prisoner is found out of the bounds of his prison, though the prisoner return again, according as he shall be prescribed. Dalt., c. 159.

If the jailor so closely pursues the prisoner who flies from him, that he retakes him, without losing sight of him, the law looks on the prisoner as far in his power all the time, as not to adjudge such a flight to amount at all to an escape; but if the jailor once lose sight of the prisoner, and afterwards retake him, he seems in strictness to be guilty of an escape. And if he kill him in the pursuit, he is in like manner guilty of an escape, though he never lost sight of him, and would not otherwise take him, not only because the State loses the benefit it might have had by the forfeiture on his attainder, but also because the public justice is not so well satisfied by the killing him in such an extra-judicial manner. 2 Haw., 130.

4. *What is a voluntary, and what a negligent escape.*

Wherever an officer, who hath the custody of a prisoner, charged with and guilty of a capital offence, doth knowingly give him his liberty, with an intent to save him from his trial or execution, this is voluntary escape. 2 Haw., 130.

A negligent escape is, when the party arrested or imprisoned doth escape against the will of him that arrested or imprisoned him, and is not freshly pursued and taken again, before he hath lost the sight of him. Dalt., c. 159.

If the constable or other officer shall voluntarily suffer a thief, being in his custody, to go into the water to drown himself, this escape is felony in the constable, and the drowning is felony in the thief; otherwise if the thief shall suddenly, without the assent of the constable, kill, hang, or drown himself, this is but a negligent escape in the constable. Dalt., c. 159.

5. *Concerning the retaking of a person escaped.*

If an officer hath arrested a man by virtue of a warrant, and then

Not if the
prisoner be
let go.

taketh his promise that he will come again, and so letteth him go, the officer cannot, after arrest, take him again by force of his former warrant, for that this was by the consent of the officer: but if he return, and put himself again under the custody of the officer, it seems that it may be probably argued, that the officer may lawfully detain him, and bring him before the justice in pursuance of the warrant. Dalt., c. 169; 1 Haw., 81.

But if the party arrested had escaped of his own wrong, without the consent of the officer, now upon fresh suit, the officer may take him again and again, so often as he escapeth, although he were out of view, or that he shall fly into another town, or county, and bring him before the justice upon whose warrant he was first arrested Dalt., c. 169.

In negligent
escape.

And it is said generally in some books, that an officer, who hath negligently suffered a prisoner to escape, may retake him wherever he finds him, without mentioning any fresh pursuit; and indeed, since the liberty gained by the prisoner is wholly owing to his own wrong there seems to be no reason he should take any manner of advantage from it. 2 Haw., 131, 132.

And wherever a person is lawfully arrested for any cause, and afterwards escapes, and shelters him in an house, the doors may be broke open to take him, on refusal of admittance. 2 Haw., 87.

It is perhaps the better opinion, that wherever a prisoner, by the negligence of his keeper, gets so far out of his power that the keeper loses sight of him, the keeper is punishable for the escape, notwithstanding he retook him immediately after: and it is clear, that he cannot excuse himself from an escape, by killing a prisoner in the pursuit, though he could not possibly retake him; but must, in such case, be content to submit to such punishment as his negligence shall appear to deserve. 2 Haw., 132.

6. *Punishment of an escape.*

If a felon escapes before arrest, it is not punishable in him as felon; Hale's Pl., 111.

By private
person.

If a private person arrest a felon, and he escape by force from him it seems it excuseth the party, because he cannot raise power to assist him; but if a constable or other officer hath the custody of a prisoner, bringing him to the jail, it seems that a simple escape by the rescue of the prisoner himself, doth not wholly excuse him, because he may take sufficient strength to his assistance. 1 H. H., 601.

Wherever a person is found guilty, upon an indictment or present

it, of a negligent escape of a criminal, actually in his custody, he ^{is} fine. punishable by fine and imprisonment, according to the quality of offence. 2 Haw., 136, 139; 1 H. H., 600, 604.

And it seems to be the better opinion, that the sheriff is as much ^{sheriff} liable for his bailiff, as if ^{liable for his} bailiff. had actually suffered it himself, and that the Court may charge ^{the} sheriff or bailiff for such an escape; and if a deputy jailor not sufficient to answer a negligent escape, his principal must ^{answer} for him. 2 Haw., 135.

If a prisoner for felony break the jail, this seems to be a negligent ^{jailor} escape of the jailor, because there wanted either that due strength ^{of} the jail that should have secured him, or that due vigilance in the ^{of} or, or his officers, to have prevented it; and therefore it is lawful ^{for} the jailor to hamper them with irons to prevent their escape; for ^{if} jailors might not be punished for this, as a negligent escape, they ^{would} be careless either to secure their prisoners, or to retake them ⁱⁿ escape. 1 H. H., 601.

It seems to be generally agreed, that a voluntary escape suffered ^{voluntary} by an officer, amounts to the same kind of crime, and is punishable ^{escape.} to the same degree, as the offence of which the party was guilty, and ⁱⁿ which he was in custody, whether it be treason, felony, or trespass. ^{by} law., 134.

But yet a voluntary escape is no felony, if the act done were not ^{by} at the time of the escape made, as in case of a mortal wound ^{on} on, and the party not dying till after the escape. Dalt., c. 159.

Also, a voluntary escape suffered by one who wrongfully takes upon ^{by wrongful} the keeping of a jail, seems to be punishable in the same manner, ^{jailor.} if he was never so rightfully entitled to such custody: for that the ^{is} he is in both cases of the same ill consequence to the public; and ^{it} seems to be no reason that a wrongful officer should have ^{more} after favour than a rightful, and that for no other reason, but because ^{is} as a wrongful one. 2 Haw., 134.

But it seemeth to be clear, that no one is punishable as for felony, ^{Principal not} the voluntary escape of a felon, but the person only who is actually ^{punished} guilty of it; and therefore that the principal jailor is only finable for ^{the} voluntary escape, suffered by his deputy; for that no one shall suffer ^{penally} for the crime of another. 2 Haw., 135.

And therefore, although in all civil causes, the sheriff is to be ^{responsible} possible, or the jailor, at election; yet if the jailor do voluntarily ^{let} for a felon in his custody to escape, this, inasmuch as it reacheth to

life, is felony only in the jailor that was immediately trusted with the custody, and not in the sheriff. 1 H. H., 597.

For the escape must be voluntarily permitted in him that permitted it, which could not be in the high sheriff, though it were such in the jailor, for he was not privy to it, and therefore could not do it feloniously; but it was a negligent escape in him, in trusting such person with the custody of his prisoners, that would be false to his trust; and therefore the sheriff shall pay, but not corporally suffer for the miscarriage of his jailor. 1 H. H., 597, 598.

Within
clergy.

But although the felony for which a man is committed, be not within clergy, yet the person who voluntarily suffers him to escape, shall have the benefit of clergy. 1 H. H., 599.

7. Precedent.

Form of an Escape Warrant.

SOUTH-CAROLINA, } ss.
District. }

By I. P., Esq., Magistrate for the district and State aforesaid.

To A. B., Constable.

- Whereas, A. O., one of the lawful constables of the said parish of hath this day made oath before me, that on or about the day of he, the said A. O., then being a constable, as aforesaid, by virtue and in pursuance of a warrant for felony, (or as the case shall be,) against E. F., now or late of labourer, duly issued by I. P., one of the justices of parish, did take and arrest the body of the said E. F.; and whereas the said E. F. so being taken and arrested by the said A. O., with force and arms, did make his escape from the said A. O., against the will of the said A. O., in contempt of the said warrant, and contrary to the laws in such case made and provided.

These are, therefore, strictly to command and enjoin you, and every of you, to make diligent search after the said E. F., and him to re-take and convey to the common jail of And the keeper of the said jail is hereby required to receive him, the said E. F., and him there safely keep, until he be from thence delivered by due course of law; and for your so doing this shall be your sufficient warrant. Given, &c.

E S T R A Y ,

Is where any horses, sheep, cows, or other tame beast is found wandering about, and their owner is unknown. What is.

1st. RIGHTS AND DUTIES OF PARTY WHERE ESTRAY IS FOUND.

2d. OF PROCEEDINGS AFTER RETURN TO A MAGISTRATE.

1st. *Rights and Duties of Parties, where Estray is found.*

By Act of 1803, 5 S. L., 6; If any estray be found in or about the plantation of any settled resident or freeholder, he may take it into possession, and advertise it in *three* days thereafter in three or more public places in the county or parish where such person resides, and within ten days after advertising, take such estray to the nearest magistrate, (excepting hogs, sheep, neat cattle, or goats, which shall be appraised at the place taken up.) Must advertise. And take to magistrate.

The person taking up a horse, mare, gelding, ass or mule, may put the same to moderate labor, as a compensation for keeping the same, and shall be liable to the owner in damages for the abuse thereof, if he shall claim it within the time limited. May put to labour.

If a party taking an estray shall not put the same to labor, he will be entitled to compensation for the finding, keeping, and other expenses thereof. Or demand compensation. Dolt., Sher., 79.

Any person who shall take up an estray, and shall neglect to advertise the same, and make return thereof to a magistrate, shall be liable to a fine of twenty dollars, to be recovered upon information in any Court of Record, to be given to the informer, and also to an action for damages by the owner. Not advertising, fined.

2d. *Of Proceedings after return to Magistrates.*

Act of 1839, p. 20, sec. 22; Every magistrate before whom an estray shall be returned, shall cause the same to be appraised on oath, by three proper persons in the neighborhood, who shall certify their appraisement, together with an accurate description of the color, size, age, brands and marks of said estray, under their hand; whereupon the said magistrate shall enter the same at large on his toll book; and shall, within ten days thereafter, send a duplicate of the said certificate to the Clerk of the Court of the district in which such estray shall be taken up; and at the same time shall cause the same to be advertised, together with notice where the said estray is to be found; if an estray other than a horse or mule, at three or more public places in the dis- Appraised and described. Notice to Clerk of Court.

Sold at
public
outcry.

Proceeds.

By Act of 1803, if any person puts in a just and lawful claim such estray after the sale, and before the note becomes due, the commissioners shall give up the note to him on his paying the customary fees.

Owner may
claim.

The fees of the magistrate are, for proceedings on estray of horse or mule, fifty cents; proceedings on all other estrays, twelve and a half cents; and of the constable, five per cent. on the proceeds of the sale.

Fees.

By Act of 1840, p. 105; and by the Act of 1803, the printer is entitled to one dollar for advertising a horse or mule.

E S T R E A T.

In all recognizances acknowledged since the 26th day of March 1784, or which shall hereafter be acknowledged by any person keeping the peace, or good behaviour, or for appearing as a party, surety or witness at any Court of criminal jurisdiction, the sum of money in which such person shall be bound, shall be made payable to the State, in aid of the revenue thereof; and every such recognizance shall be good in law, provided it be signed by every party thereto and also acknowledged in the presence of a judge, or justice of the peace, who shall certify such acknowledgement: otherwise such recognizance shall be void. And whenever any such recognizance shall become forfeited, the attorney-general, or other person acting for him, shall, without delay, issue a *scire facias* to summon every party bound in such forfeited recognizance, to appear at the next ensuing Court of Sessions, to show cause why judgement should not be confirmed against him: and if any person so bound, fail to appear

Sci. Fa. to
be issued.

or appearing, shall not give such reason for not performing the condition of such recognizance as the Court shall deem sufficient, then the judgement on such recognizance shall be confirmed. And in every case where any such recognizance shall be adjudged forfeited, or where any fine shall be imposed by, or recovered for the use of the State, in any district or county Court, or before a justice, if the party incurring such fine or forfeiture shall fail to pay down the same, with the costs of prosecution, then a writ in nature of a *fi. fa.*, shall issue, by virtue of which the sheriff shall sell (in the same manner as property is sold under execution in civil cases) so much of such offender's estate, real or personal, as may be necessary to satisfy the fine or forfeiture, the costs of prosecution, and the charges of taking, keeping and selling such property; returning the overplus, if any, to the offender, together with a bill of the fine or forfeiture, with costs and charges, if he require it. But the sheriff shall sell every other part of the personal estate before he shall sell any negro; and if the sheriff return on oath that such offender refuseth to pay, or hath no property, or not sufficient whereon to levy, then a writ of *capias ad satisfaciendum* shall issue, whereby he shall be committed to the common jail, until the forfeiture, costs and charges shall be satisfied; entitled however to the privilege of insolvent debtors. A. A., No. 1467.

Fi. Fa. on failure to pay.

Ca. Sa. on return of *Fi. Fa.*

The sheriff of each district, and every justice of peace, or clerk of any Court, after receiving any fine or forfeiture, shall, as soon as may be, pay the same into the public treasury, excepting such fines and forfeitures as shall be appropriated for the use of such county, in such manner as shall be directed by a majority of the judges thereof: and if any sheriff, or any clerk of a Court shall keep in his hands any monies which shall be recovered by, or paid to him for any fine or forfeiture, for any space of time more than two calendar months after such monies shall have been delivered to him, he shall forfeit treble the amount of the sum so detained. And every sheriff, justice, and clerk of a Court, shall cause to be kept a just and regular entry of all fines and forfeitures that shall come into his hands respectively: and if any fraud or wilful failure shall be committed by any sheriff, justice, or clerk of a Court, or constable, in levying, paying, or accounting for any fine or forfeiture, and he be thereof convicted, the offender shall forfeit treble the sum, whereof there shall be committed fraud or failure, and be thereafter incapable to hold his office.

Fine to be paid into Treasury in two months, on penalty.

EVIDENCE.

[See ACCOMPLICE, CAUSES SMALL AND MEAN, EXAMINATION, &c.]

1st. OF THE PARTIES.

2d. BOOKS OF ACCOUNT.

3d. COMPETENCY AND CREDIBILITY OF WITNESSES.

4th. OF VARIOUS KINDS OF TESTIMONY, AND ITS ADMISSIBILITY

1st. Of the Parties.

In civil
cases before
magistrate.

By Act of 1839, page 17th, sec. 15th; In case a witness is not, or cannot, be produced to prove such demand, or any matter or thing pertaining thereto, the said magistrate may examine on oath, either party, such oath being first proposed to the defendant, and on his refusal to take the same, or to answer such questions as shall be demanded of him by said magistrate, then to be proposed to the plaintiff: *Provided*, that nothing herein shall prevent any plaintiff from proving his demand, when by law he is a competent witness: and provided also, that if any discount be set up in examining the same, the rule shall be reversed as to the right of being first sworn.

In cases of
usury.

In all cases whatsoever, where any suit or action shall be brought, sued or depending, in any Court of Record in this State, touching or concerning any usurious bond, specialty, contract, promise, or agreement, or taking of usury or higher rates of interest than is allowed by this act, the borrower or party to such usurious bond, specialty, contract, promise, or agreement, or from whom such higher rates of interest is or shall be demanded, had or taken, shall be, and is hereby declared to be, a good and sufficient witness in law to give evidence of such offence against this act; *Provided always*, that if the person or persons against whom such evidence is offered to be given, will deny upon oath, in open Court to be administered, the truth of what such evidence offers to swear against him, then such witness shall not be admitted to be sworn; and if any witness or party shall forswear himself in any such matter, he and they so doing, and being thereof lawfully convicted, shall suffer all the pains and penalties, which, by the laws now in force in this State, ought to be inflicted on persons convicted of wilful and corrupt perjury. 4th S. L., 364, § 2.

Proviso.

In cases of
ballment.

Where a shipmaster received on board his vessel a trunk of goods, to be carried to another port, but on the passage, he broke open the

trunk, and rifled it of its contents; in an action by the owner of the goods, against the ship-master, the plaintiff, proving *aliunde*, the delivery of the trunk, and its violation, was held competent as a witness to testify to the particular contents of the trunk. And on the same principle, the bailor, though a plaintiff, has been admitted a competent witness to prove the contents of a trunk, lost by the negligence of the bailee. Such evidence is admitted, not solely on the ground of the just odium entertained, both in equity and at law, against spoliation, but also because, from the necessity of the case and the nature of the subject, no proof can otherwise be expected; it not being usual even for the most prudent persons, in such cases, to exhibit the contents of their trunks to strangers, or to provide other evidence of their value. Greenleaf, p. 417, sec. 348.

2d. Books of Account.

The rule as to what books and charges are admissible in evidence, has been wholly settled by the decisions of the Court, the only statutes touching the same being 7 James 1st, c. 12, and the Act of 1721, 7th S. L., 168; the first of which has been held not of force; *Foster vs. Sinkler*, 1st Bay, 40; and the latter being merely a partial recognition of an existing custom, founded on necessity.

Whose books are admissible.

The original book of entries of a merchant or shop-keeper, is good evidence to go to a jury, upon the plaintiff's swearing to the same. *Foster vs. Sinkler*, 1st Bay, 40. Merchants.

The books of tradesmen and mechanics, are good evidence to prove work and labour. *Slade vs. Teasdale*, 2d Bay, 40; and *Lamb vs. Hart*, *ibid*, 362. Tradesmen and mechanics.

A printer's books are admissible to prove his accounts, for advertisements and the delivery of his newspaper, when he has no better evidence in his power; *Thomas vs. Dyott*, 1 N. & M'C., 186: but a printer's books are only evidence to prove the authority for advertising, and the file of newspapers must be produced to shew the performance of the printing alleged to have been done. *Richards vs. Howard*, 2d N. & M'C., 474. Printers.

The books of the owner of a ferry are admissible to prove an account for ferriage; *Frazier vs. Drayton*, 2d N. & M'C., 471: but in the case of *Boyd vs. Ladson*, 4th M'Cord, 76, the Court expresses dissatisfaction with this case. Ferry-men.

A miller's books, who swore to the original entries which he made, millers.

are admissible to prove the quantity of lumber furnished from his saw mill to the defendant. *Gordan vs. Arnold*, 1 M'C., 517.

Physicians. The cases of *Schmidt vs. Quin*, 1st M'C., 418; and *Lance vs. McKenzie*, 2d Bailey, 449; allow the admissibility of the books of a physician, when the charges are regular and specific.

Whose books are not admissible.

Pedlars. The memorandum books of a pedlar, in which he made his original entries for the most part in pencil, and carried about with him in his pocket, are not admissible in evidence. *Thayer vs. Deen*, 2 Hill, 877.

Scriveners. The books of accounts of a scrivener are not admissible. *Watson vs. Bigelow*, 2d Brevard, 127.

Jailor. A jailor's books are not evidence to prove the length of a prisoner's confinement under a *ca. sa.*, in an action by the sheriff against the plaintiff in the execution for his maintenance while in jail. They would not be evidence for the jailor, if the action were brought in his own name, as they are not the best evidence of the fact the nature of the case admits of. *Walker vs. McMahan*, 1st Tr., 130.

Planters. Books of accounts, of a farmer or planter, are not admissible in evidence. *Jeter vs. Martin*, 2d Brevard, 158.

Schoolmaster. The books of a schoolmaster regularly kept, are not admissible to prove his account. *Pelzer vs. Cranston*, 2d M'C., 328.

Billiard table keeper. The books of the keeper of a billiard table, are not admissible evidence. *Boyd vs. Ladson*, 4th M'C., 76.

Entries must be regular and particular.

On front leaf. Entries made in the front leaf of a tradesman's books, before the first page, and not in the regular course of charges, have a suspicious appearance, and therefore not proper to go to a jury. But the plaintiff may rely on other testimony, if he thinks proper. *Lynch vs. M'Hugo*, 1st Bay, 33.

Memorandum books. A memorandum book, kept by the master workman of mechanics, written some in ink, and some with a pencil, is not admissible, with his (defendant's) oath to prove the loss of day's work by plaintiff's slave, who was hired to the defendant; though that might have been the customary way of keeping such account. *McKewn vs. Barkdale*, 2d N. & M'C., 17.

Entry on slate. A shoe-maker's book, to which entries were transferred from a slate, without proving who made the entries on the slate, or that they were daily transferred, not evidence. *Drummond vs. Hyams; Harper*, 268.

Sale by one, and entry by another. When a shop-keeper, himself, sold and delivered goods to a party, and during the same day, the entries were made by another person,

who occasionally acted as clerk for him, it was held, that the book was no evidence of the debt, and that the evidence was inadmissible. *Harris vs. Caldwell*, 2d M'Mullan, 133.

Where the entries in the plaintiff's book, which was offered in evidence, were in part made from memoranda taken by his slave, at the time of delivery of the articles, and partly from memoranda made by the defendants themselves, *held*, that the entries were not admissible in evidence, and that the plaintiff was not a competent witness to prove them. *Venning vs. Hacker & Smiezer*, 2d Hill, 584.

What may, or not, be proved by book entry.

The books of a bricklayer, or other mechanic, as well as the merchant, are admissible to prove the performance of a particular job of work in the course of his trade, and of articles furnished. But the articles must be specified, and a general charge for work and labor is not good. *Administrator of Lynch ads Petrie*, 1st N. & M'C., 130.

A tailor's shop book of entries, is not competent evidence to prove a verbal order of the defendant, to let his ward have clothes. *Deas ads Darby*, 1st N. & M'C., 436.

If a merchant's book of original entries shew that the goods charged to defendant were delivered to a third person, the entries, supported by plaintiff's oath, are not, of themselves, enough to charge the defendant. The order, direction, or request, of the defendants, must be proved by other evidence. *Kinloch, Phillips & Co., vs. Brown*, 1st Rich., 223.

A party is never permitted to be a witness in his own cause, except in the single case of book entries, and then only to such entries as embrace the usual items of a merchant's, such as goods, wares, and merchandise; but he is never suffered to be witness to prove an entry for money lent, or money paid, for the use of another, or any special contract whatever. *Ferguson vs. Ford*, MSS. Dec. 1826.

The books of a tradesman or mechanic are admissible in evidence only to prove the performance and delivery of work done within the mechanic's shop. Where the work is done outside of his shop, or on the premises of the party charged, such as building or repairing a house, or any other fixture, there can be no necessity for books, for the work is apparent and palpable. *St. Philip's Church, ads White*, 2d McMullan, 306.

The books of accounts of tavern keepers, shop-keepers, or retailers of spirituous liquors, shall not be admitted, allowed or received, as evidence in any Court having a right to try the same, of any debt

Special agreement.

Nor verbal order.

Nor money lent.

Nor work out of shop.

Nor liquors sold, less than one quart.

contracted, or monies due, for spirituous liquors sold in less quantity than a quart. 6th S. L., 318.

How entries must be proved.

By clerk. Entries made in merchant's books, must be proved by the clerk who made them, if in the State. *Tunno, vs. Rogers & McBride*, Bay, 480.

If clerk is absent. A book account may be proved by proving the handwriting of clerk who made the entries, if he be out of the State. *Elms Chevis*, 2d M'C., 349.

By party. A merchant may prove his book entries, in any case where becomes necessary to have them proved. *Black vs. Shooler*, M'C., 293.

Where the plaintiff, a merchant, was absent from the State at trial of the cause, held, that proof of the original entries being in hand writing, was incompetent evidence. The only cases where entries have been proved by others than those who made them, have been in cases tried on writs of enquiry. It is never permitted, while the defendant appears and defends the case. *Douglass vs. Hart*, M'C., 257.

A merchant's account cannot be proved by evidence of the entries in his books, unless the books are produced in Court; and his residence at a distance from the district, in which the suit is brought, does not furnish ground for an exception to the rule; *Furman and Smith Peay*, 2d Bailey, 394: but a disinterested witness, who made the entries, may be so examined without the production of the books, if the entries in the book are mere memoranda, to which he may refer to refresh his memory. *Nicholson vs. Withers*, 2d M'C., 428.

Sale by the wife. Where entries were made by the plaintiff, of goods delivered to his wife, in his absence, they must be proved by the wife. *He vs. executors Neufville*, 2 M'C., 138.

By colored persons. Book entries made by a free negro, cannot be received in evidence on the oath of a white person to his hand-writing. *Groning Devana*, 2d Bailey, 192.

3d. Competency and credibility of witnesses.

A witness may be incompetent from interest, from public policy, from absence of religious obligations, or from caste.

Incompetency from interest.

Must be a legal interest. To render a witness incompetent, the interest must be a legal interest in the event of the suit, or in the record, as contradistingu-

from mere prejudice or bias, arising from the circumstance of relationship, friendship, or any other of the numerous motives by which a witness may be supposed to be influenced. 1st Starkie, 102.

A mere doubt that a witness would be liable in Equity, when not liable at law, is not sufficient to exclude him as incompetent. *Sims vs. Sims*, 1st Tr., 131.

If a party be really interested in the event of a cause, he is not competent, although he does not apprehend that his interest is a legal one, for it would be exceedingly dangerous to violate a general rule, because the witness does not understand his legal responsibility. If a witness suppose that he is under an *honorary* though not a *legal* engagement, as to indemnify the bail, he is still competent, for he is under no binding engagement, and it would be highly inconvenient to make competency in such case to depend on the witnesses notions of propriety, and would savour of inconsistency to found a suspicion of his veracity upon a just and honorable feeling.—1st Starkie, 102.

That a witness merely believes himself interested in the event of a suit, does not render him incompetent. *Havis vs. Barkley*. Har. 63.

The interest must be a present, certain, vested interest, and not uncertain or contingent. And therefore the heir apparent to an estate is competent to give evidence in support of the claim of the ancestor, although one who has a *vested* interest as a remainder-man, is incompetent. 1st Starkie, 103.

Where the interest is of a doubtful nature, the objection goes to the credit, not the competency of the witness. The possibility of an action being brought against the witness, in case his testimony shall not prevail, and the tendency of his testimony to render his liability less probable, will not exclude him. 1st Starkie, 104.

The declarations of a witness, that he is interested in the event of a suit, are not, *per se*, sufficient to deprive the party by whom he is called, of the benefit of his examination. *Cotchet vs. Dixon*, 4th McC., 311.

To exclude a witness, it is not enough that he has an interest in the subject matter of litigation; it must be an interest in the event of the particular cause.—*Ibid*.

A surety of deceased debtor is admissible as a witness, to disprove demand against the estate of his principal: and it makes no difference, that he believes the estate to be insolvent, and that the demand, which he is called to disprove, is of superior degree, and will exhaust the assets. His interest to increase or preserve the fund, out of which the debt, for which he is surety, is to be paid, is not that cer-

tain, direct, and immediate interest, which affects the competency of a witness. *Ogier vs. Deas*; 1st Bailey, 473.

The obtaining of means to pay a debt does not create such an interest as will disqualify a witness,—the interest must be certain and direct. A debtor who has delivered property to another in order to defraud his creditors, and afterwards sells the property to a *bona fide* purchaser, on being released, is a competent witness to sustain the purchase. *Ex'ors of Caston vs. Ballard*; 1st Hill, 406.

In the immediate and legal result.

A witness is incompetent where he is a party, though but a nominal party, to the suit; or is a party in beneficial interest; or is *quasi* a party, from having entered into a rule of Court or contract that another cause in which he is a party shall abide the same result with that in which he purposes to give evidence; or where the immediate effect of the verdict will be to increase or diminish a fund, in which he has a joint interest; as where the bankrupt, or a creditor on a bankrupt's estate, seeks to increase the fund; or to deprive the witness of the enjoyment of an interest in possession; or place him in the immediate possession of a right. 1st Starkie, 106.

The maker of a promissory note is not a competent witness for the indorser, in any action against him by the holder, when the note was indorsed for the accommodation of the maker. He is liable over to the indorser for costs, and therefore does not stand indifferent between the parties. *Chur. vs. Keckeley*; 1st Bailey, 479.

A witness, offered by the plaintiffs, had purchased the property in dispute from the defendant, on the condition that he was not to pay the stipulated price, if the defendant failed to establish his title in the action. *Held*, that he had acquired, by his contract, an interest in the record to defeat the defendant, which was not counterbalanced by a similar interest as to the plaintiffs, and he did not therefore stand indifferent between the parties, and was incompetent. *Jones vs. McNeill*; 2d Bailey, 466.

The payee of a promissory note, if not actually interested, is a competent witness, in an action by the holder against the maker, to prove that it has been paid. *Bobo vs. Bostick*; 2d Bailey, 106.

An executor, party to an issue of *devisavit vel non*, though he takes nothing by the will, cannot be examined as a witness in the cause. *Ex'or. of Butler vs. Brown*; 4th McC., 25.

Right of share, or liability to contribute.

Where the witness is called for the plaintiff, with whom he is co-partner; or where the witness is a co-partner with the defendant in the subject matter of the suit, and would be liable to contribution in case the defendant failed in his defence. And as a co-partner by reason of his liability to contribution, would not be a competent

witness for the defendant, to whom, on a verdict against him, he would be liable to contribute, he is, on the other hand, a competent witness for the plaintiff in action against the co-partner. 1st Starkie, 107.

Where all the witnesses to a will are legatees, and are to take a beneficial interest under it, none of them can be permitted to prove, unless a release is given by the legatee, who is offered as the witness. *Dickson vs. Bates*; 2d Bay, 448.

Where two gave their joint and several note, upon which, one was sued, the other cannot be a witness for the defendant. *Kile vs. Gram*; 1st McC., 552.

A party is an incompetent witness to increase a fund out of which he is to receive a dividend; and where the plaintiff was insolvent, and had assigned his estate, under the Prison Bounds Act, to all his creditors, and a creditor was offered as a witness, who said that if the plaintiff recovered, he expected to be paid, otherwise not; *Held*, that the witness was incompetent. *Cleverly vs. McCullough*; 2d Hill, 445.

It seems that, in general, where the witness is so far interested in a case upon which the verdict depends, that if his party failed, and the result were contrary to his testimony, he would be liable to that party for the debt, damages or costs, he would be incompetent; for in every such case he would lie under an interest to represent the fact one way, rather than the other, in favor of his party rather than against him, in order to get rid of his own liability, which, if the fact were otherwise, would be consequent on a verdict against that party. 1st Starkie, 111. One who had guaranteed the ultimate payment of a bond, was held an incompetent witness to prove that it had not been paid to himself, while it was in his possession, assigned in blank. *Stoney vs. McNeill*; *Arper*, 156.

A vendor of goods is not a competent witness to support the title of a vendee against third persons, claiming adversely to his own title. *Munders vs. Addis*; 1 Bailey, 49.

The surety to a bond to the sheriff, to indemnify him in making a return, is not a competent witness for the sheriff, in an action against him for the trespass. *Terry vs. Belcher*; 1st Bailey, 568.

If the interest be of the nature above described, its magnitude is not material; and the objection must prevail, however minute the interest may be. The reason seems to be this: a plain and simple rule is absolutely necessary, and if a small degree of interest did not disqualify the witness, it would be impossible to draw a practicable line of distinction. 1st Starkie, 118.

Neutrality of
interest.

A witness whose interest is equal on both sides, is competent. *Alston vs. Huggins*; 2d Tr., 688.

Though a person be interested with the subject matter of the action yet if his interest on either side is balanced, it will not affect his competency. *Smyth vs. McDow*; 1st M. C., 277.

Incompetency from public policy.

Husband and
wife.

The husband and wife cannot be witnesses for each other, for their interests are identical; nor against each other, on grounds of public policy, for fear of creating distrust and sowing dissensions between them, and occasioning perjury. So important is this rule, that the law will not allow it to be violated, even by agreement; the wife cannot be examined against her husband, although he consent; and the principle is further preserved by adhering to the rule, even after the marriage tie has been dissolved, by the death of one of the parties or by a divorce for adultery. 2d Starkie, 400.

Where one
of them is a
party.

Where either of them is a party, the rule seems to be universal that the other is altogether incompetent in either civil or criminal proceedings. In an action by the plaintiff, as a *feme sole*, for goods sold and delivered, the husband is not competent to defeat the action by proof of the marriage. Upon an indictment for bigamy, the first wife is incompetent; and the second wife is also incompetent until the first marriage has been established; so in a criminal case, the wife is not a competent witness against any co-defendant tried with her husband, if the testimony concern the husband, although it be not given directly against the husband. 2d Starkie, 400.

A husband cannot be received as a witness, to testify for the benefit of an estate, of which his wife is a distributee; although they live apart, deal separately, and are under bonds not to interfere with the property of each other. *Terry vs. Belcher*; 1st Bailey, 568; but the wife is a competent witness to testify against the interest of her husband, in a suit between third persons, if the husband himself do not object. *Jackson vs. Heath*; 1st Bailey, 355; and also, the wife may be a witness against her husband on a prosecution for a personal outrage against herself. *State vs. Boyd*, 2d Hill, 288.

Attorney
and client.

Upon the same principle, the law prohibits a barrister, solicitor, or attorney, from divulging that which has been reposed in him confidentially by his client. The same principle evidently applies to the case of an interpreter between an attorney and his client.

Here, however, the law draws the line; and the principle of policy which, in the instances of husband and wife, and of attorney and

lient, forbids a violation of confidence, ceases to operate. The law will not permit any one to withhold from the information of the jury any communication which is important as evidence, however secret and confidential the nature of that communication may have been, although it may have been made to a physician or surgeon, or even to a divine, in the course of discharging his professional duties; for it *has even* been held, that a minister is bound to disclose that which has been revealed to him as a matter of religious confession. 1 Starkie, 70.

Upon a principle of humanity, as well as of policy, every witness is protected from answering questions, by doing which, he would criminate himself. Of policy, because it would place the witness under the strongest temptation to commit the crime of perjury; and of humanity, because it would be to extort a confession of the truth by a kind of duress, every species and degree of which the law abhors. *bid.*

Witness not bound to criminate himself.

Want of religious obligation.

Before a witness takes the oath, he may be asked whether he believes in the existence of a God, in the obligation of an oath, and in a future state of rewards and punishments; and if he does, he may be admitted to give evidence. And it seems that he ought to be admitted if he believes in the existence of a God, who will reward or punish him in this world, although he does not believe in a future state. 1st Starkie, 93.

Religious belief.

A person who does not believe in future rewards and punishments, but that our evil deeds will all be punished in this world, and that we shall exist immortal in a future state, exempted from punishment for the deeds done in the body, is a competent witness. *Farnandis v. Henderson, Rice's Digest, 403.*

In criminal cases, where a person of tender years is a material witness, it is usual for the Court to examine the witness as to his competency to take an oath before he goes before the grand jury. And if such a witness be found incompetent for want of proper instruction, the Court will, in its discretion, put off the trial, in order that the party may in the meantime receive such instruction as will qualify him to take an oath. Neither the testimony of the child without oath, nor evidence of any statement which he has made to any other person, is admissible. 1st Starkie, 94.

From infancy.

The crimes which render a person incompetent, are treason, felony, offences founded in fraud, and which come within the general

From crime.

notion of the *crimin falsi* of the Roman law, as perjury, forgery, cy, swindling and cheating. So also, barrettry, the bribing a witness to absent himself from a trial, in order to get rid of his evidence, also the judgement on an attainder for a false verdict, will render the party so convicted incompetent; so also, as it seems, one who has been convicted of winning money by fraud, or ill practice at card games, would be disabled by the Statute 9 Anne, c. 14, sec. 5, from being a witness, since that statute not only imposes a penalty but directs that the party shall be deemed infamous. But a conviction for keeping a gambling house does not disqualify the defendant. Ibid, 95.

In order to incapacitate the party, the judgement must be pronounced by a Court possessing competent jurisdiction. A verdict of the verdict or conviction without the judgement, is insufficient, since it may have been quashed on motion in arrest of judgement. And the judgement must be proved by the record in the usual manner, but it is not material to shew that judgement has been executed. Ibid, 96.

Incompetency from caste.

Slaves in civil cases. A free negro is an incompetent witness in any case where the rights of white persons are concerned. *White vs. Holmes*, 1st 430.

A free person of colour is not a competent witness, in any case although both the parties to the suit are of the same class with himself. *Groning vs. Devana*, 2d Bailey, 192.

But the declarations of a negro may be given in evidence, they constitute a part of the *res gestæ*. *Parris vs. Jenkins*, 2d 106. And in an action for the breach of warranty of the soundness of a slave, the declarations of the slave, by which disease was detected, were held admissible evidence as inducement, and from the nature of the case. *Gray vs. Young, Harper*, 38.

Criminal cases.

The evidence of all free Indians, without oath, and the evidence of any slave, without oath, shall be allowed and admitted in all cases whatsoever, for or against another slave accused of any criminal offence whatsoever; the weight of which evidence being separately considered, and compared with all other circumstances attending the case, shall be left to the conscience of the justices and freeholders. 7th S. L., 401, sec. 13: also, the evidence of any free Indian slave, without oath, shall in like manner be allowed and admitted.

all cases against any free negroes, Indians, (free Indians, in amity with this government, only excepted) mulatto or mestizo.—Ibid, sec. 14.

Incompetency, how shewn.

The presumption is, that a person, not a party to the record, is ^{By party} competent, and the party alleging his incompetency must shew it, ^{alleging.} either by examination of the witness on his *voir dire*, or by the testimony of other witnesses. *Cotchet vs. Dixon*, 4 M'C., 311.

Competency, how restored.

The competency of a witness may be restored as well by an as- ^{In case of} signment without warranty, as by a release of his interest. ^{interest.} *Cates vs. heirs of Wacter*, 2d Hill, 442.

The heirs or legatees of an estate are incompetent witnesses in behalf of an estate, in a suit brought by the executors, but it is an interest that may be released, and the release need not necessarily be made to the defendant, but may be made to any one who will accept; 1st *Rice's Digest*, Tit. Evidence, 423: but a dormant partner cannot, by releasing his interest, render himself a competent witness for the ostensible partner, in a suit brought by the latter upon a contract made by him, within the objects, and for the benefit of the co-partnership. His liability for the debts of the co-partnership, and his consequent interest to increase the co-partnership fund, cannot be discharged, or removed, by his own release; and although there should be no debts, his liability to the opposite party, for the costs of the suit, renders him incompetent; *Pickett vs. Cloud*, 1st Bailey, 362.

The objection to competency on the ground of infamy, may be ^{In case of} answered, 1st, by proof that the party has been admitted to his clergy, ^{crime.} and undergone such punishment as is equivalent to clerical purgation at the common law, or that he has undergone the sentence according to the late statutes; 2d, by proof of pardon; 3d, by proof of the reversal of the judgement. 1st *Starkie*, 96.

Credibility, how impeached.

The credit of a witness may be impeached either by cross examination, or by general evidence affecting his credit, or by evidence that he has before done or said that which is inconsistent with his evidence on the trial, or, lastly, by contrary evidence as to the facts themselves. 1st *Starkie*, 181.

Irrelevant questions may be put to a witness on his cross-exami-

By cross-examination.

nation, with the view of obtaining from him contradictory or inconsistent answers, and of thus impeaching and destroying his credit; but they cannot be asked with a view to calling other witnesses to contradict his answers: and the presiding judge may, in his discretion, arrest a cross-examination, which extends to a wide and unprofitable range of interrogations. *Jones vs. McNeill*, 2d Bailey, 466.

General evidence.

When the credit of a witness is attacked, the first question to be put is, "what is the general character of the witness, *good or bad*?" If the answer be that the character is *bad*, then the individual opinion of the person under examination may be obtained, "would you believe him on his oath?" Some have thought it most expedient to ask, in the first instance, "what is the general character as to veracity?" Now, although there can be no objection to such a question, as the enquiry relates to the veracity, yet it is not as proper as the more general question, because the witness may be a very bad man, and yet may not have established any character as to veracity, and if he be a man of bad character, that is a very good reason why he should be disbelieved. *Dollard vs. Dollard*; 1st Rice; Title Evidence, 439.

To impeach the credibility of a witness, evidence of particular facts cannot be gone into, only of general reputation. *State vs. Alexander*; 2d M. C., 171.

The credit of a witness may be attacked, by proof that he had said "that on some occasions he would swear a lie." *Anonymous*; 1st Hill, 251.

Proof of declaration.

It is a general rule, that whenever the credit of a witness is to be impeached by proof of any thing that he has said or declared, or done in relation to the cause, he is first to be asked, upon cross-examination whether he has said or declared, or done that which is intended to be proved. If the witness admit the words, declaration, or act, proof on the other side becomes unnecessary, and an opportunity to the witness of giving such reasons, explanations or exculpations of his conduct, if any there be, as the circumstances may furnish; and thus the whole matter is brought before the Court at once, which is the most convenient course. 1st Starkie, 183.

Contradiction.

Although the answer of a witness to an immaterial question cannot be contradicted to impeach his credit, yet, if the question is even indirectly material to the issue, the answer of the witness may be contradicted. *Smith vs. Henry*; 2d Bailey, 118.

A party not allowed to discredit his own witness.

A party cannot discredit the testimony of his own witness, or show his incompetency; for it would be unfair that he should have the benefit of the testimony, if favorable, and be able to reject it, if the contrar-

re, however, a party is under the necessity of calling a witness for the purpose of satisfying the formal proof which the law requires, is not precluded from calling other witnesses who give contradictory testimony. And even where a witness by surprise gives evidence against the party who called him, that party will not be precluded from proving his case by other witnesses. 1st Starkie, 185.

The rule that a party cannot impeach his own witness, is confined to the introduction of general evidence to destroy his credit; he may call other witnesses to contradict him as to particular facts relevant to the issue. *Perry vs. Massey*; 1 Bailey, 32.

A party cannot bring evidence to confirm the character of a witness before the credit of that witness has been impeached, either upon cross-examination, or by the testimony of other witnesses; but if the character of a witness has been impeached, although upon cross-examination only, evidence on the other side may be given to support the character of the witness by general evidence of good conduct. 1st Starkie, 186.

4th. *The various kinds of testimony and their admissibility.*

Admissions.

The admissions of a party to the suit against his interest, or evidence in favor of the other side, whether made by the real party on record, or by a nominal party who sues as a trustee for the benefit of another, or whether by the party who is really interested in it, though not named on the record. 1st Philip's Ev., 74.

The admissions of a defendant are always considered the best evidence against him; and a fact strongly and often asserted by the other party or his agent, in the presence of the defendant, touching the principal matter, and not denied by him, may be considered as admitted.

Hendrickson, adm'r of Ryer, vs. Miller; 1st M. C., 296.

A acknowledgement of a debt may be frequently implied from the act and demeanor of a person, no less than from an express admission, and the forbearance and non-interference of one party, with knowledge of adverse acts done by another party, is a circumstance to shew his acquiescence. 1st Philip's Ev., 83.

A community of interest or design, will frequently make the declaration of one, the declaration of all. Thus in the case where parties or others, possess a community of interest in a particular subject, not only the act and agreement, but the declaration of one in respect to that subject matter, is evidence against the rest. The admission of several makers of a joint and several promissory note, that it has not been paid, is evidence against all. Such an admission, however, ought to be clear and unequivocal. 2d Starkie, 25.

By partner. A letter written by one co-partner after the dissolution of the co-partnership, acknowledging the justness of a debt, will bind the other. *Simpson & Morrison vs. Geddes*, 2d Bay, 533. But, the admission of a debt by one partner who had become insolvent, made a long time after the dissolution of the co-partnership, is not admissible to charge the others. *Chardon vs. Oliphant, et. al.*; 2d Tr., 685.

By agent. The statement or representation of an agent, in making an agreement, *or in doing an act within the scope of his authority*, is evidence against the principal himself, and equivalent to his own acknowledgment. 1st Phillips' Evi., 77.

The declarations of an agent in relation to things done by him, in the regular course of his agency, is competent evidence against his principal. *Clough vs. Little*; 1st Rice. Tit. Evi., 404.

On the same principle, if one party refers another for information on a disputed fact, to a third person as authorized to answer for him, or employs an agent to make certain propositions respecting a transaction between himself and another, he is bound by what his agent says, or does, within the scope of his authority, as much as if it had been said, or done, by himself. 1st Phillips' Evi., 81.

By a wife. But notwithstanding a community of interest, the declaration of the wife will not, in general, bind the husband. But where the authority of the wife to act as agent to her husband can be presumed, her declarations are like those of any other agent; accordingly, the admission of the wife, as to an agreement for suckling a child, was held to be evidence against him. So where an action was brought by the direction of the wife, in the name of her husband, to recover a sum of money which had been taken from her, on suspicion that it was the produce of stolen property, it was held, that what she had said, (in the absence of the husband) respecting the money, when examined on a charge of being concerned in the robbery, was evidence for the defendant. So in an action against the husband for goods sold to his wife during the time when he occasionally visited her, it was held, that a letter subsequently written by the wife, acknowledging the debt, was evidence. 2d Starkie, 26.

The whole is to be taken. Although the whole confession must be received and not garbled, yet the jury are not bound to give implicit faith to the whole or any part. *Smith vs. Hunt*; 1st McC., 449.

Confessions.

In criminal cases. A confession, where it is voluntary, is one of the strongest proofs of guilt; for it cannot be supposed that a person, really innocent, would

voluntarily subject himself to infamy and punishment. Many of the rules applicable to admissions in civil cases are applicable to those in criminal proceedings, but there are some which are peculiar to the latter. 2d Starkie, 27.

A confession can never be received in evidence, where the defendant has been influenced by *any* threat or promise. To say, that it will be better for him if he will confess, or worse if he will not, is sufficient to exclude the consequent declaration by the prisoner; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration, if *any* degree of influence has been exerted. And where a confession has once been induced by such means, all subsequent admissions of the same, or of the like facts, must be rejected, if they have resulted from the same influence.

It is, however, a question for the Court, and not for the jury, to decide, whether under the particular circumstances, the confession be admissible. *Ibid.*

It is a general rule, founded upon principles already adverted to, that the admission or confession of one defendant is not evidence against any but himself; except, indeed, such a privity and community in the same original design be proved, as to render that which has been said or done by one, in furtherance of the common object, fair and reasonable evidence of the general design and project itself. 2d Starkie, 31. Not evidence against another.

Where several are tried at the same time, and the confession of one implicates another, the evidence cannot on that account be rejected; the usual course is, for the Court to inform the jury that the confession is evidence against that party only by whom it is made. *Ibid.* But the confessions of a slave of his own guilt as principal, are admissible in evidence, on the trial of a free white man, as accessory before the fact. *State vs. Sims*; 2d Bailey, 29.

Hearsay.

Hearsay evidence of a fact, is not admissible. And the same principle is applicable to statements in writing, no less than to words spoken; whether spoken or written, they are equally inadmissible in evidence. The only difference between them in this respect, is, that here is a greater facility of proof in the one case than in the other; written account is proved to be genuine, by proof of the handwriting; but the genuineness of mere oral declarations must depend upon the memory and accuracy of the witness, who professes to repeat Not admissible.

them. To this general rule there are some exceptions, which are separately considered. Phillip's Evi., 186.

In case of pedigree.

Hearsay and reputation, (which latter is the hearsay of those who may be supposed to have known the fact, handed down from another,) have been admitted as evidence in cases of pedigree. Thus, declarations of deceased members of the family are admitted as evidence to prove relationship; as, who was a person's grandfather or whom he married, or how many children he had, or as to the date of a marriage, or of the birth of a child, and the like, of which it cannot be reasonably presumed that better evidence is to be procured. Ibid.

Time of birth, but not as to place.

On a question, whether a testator, at the time of making his will, was of full age, a written memorandum of his deceased father, at the time of his birth, has been admitted to be good evidence. Such declarations are not admissible as to place of birth. 1st P. Evi., 195.

Questions of boundary.

The declarations of deceased persons, who shall appear to have been in a situation to possess the information, and not interested, are admissible, on questions of boundaries; as the declarations of owners, chain-carriers, &c. Spear and Coate, 3d M'C., 227.

Declarations against interest.

The declarations of deceased persons have also been admitted in cases where they appear to be made against their interest; as, in their books, charging themselves with the receipt of money from the account of a third person, or acknowledging the payment of money due to themselves. 1st Phillip's Evi., 207.

The declarations of the payee of a note, made before endorsement, against his interest, are admissible, but not after he has endorsed. Crayton & Sloan vs. Collins; 2d McC., 457.

Dying declarations.

The dying declarations of a person, who has received a mortal injury, that is, declarations made under the apprehension of death, are constantly admitted in criminal prosecutions, and are not liable to the common objection against hearsay evidence. The principle of the exception to the general rule is founded partly on the awful situation of the dying person, which is considered to be as powerful a constraint on his conscience as the obligation of an oath, and partly on the absence of interest on the verge of the next world, which diminishes the necessity of cross examination. 1st Phillips' Evi., 21.

The deceased, on the day previous to his death, and when he was conscious that he was *in extremis*, deposed to the circumstances under which he received the mortal blow was given; and on the next day, when he was found to be conscious of approaching death, the deposition was read over to him.

said that, "it was as nigh right as he could recollect;" *held*, that deposition was admissible in evidence as the dying declarations of the deceased. *State vs. Ferguson*, 2d Hill, 619.

Hearsay is often admitted in evidence, as part of the *res gesta*; the meaning of which seems to be, that where it is necessary in the course of a cause to inquire into the nature of a particular act, or the intention of the person who did the act, proof of what the person said at the time of doing it, is admissible evidence, for the purpose of shewing its true character. 1st Phillip's Evi., 219. Thus, the declarations of a party, when accompanied by an act, may be received in evidence, as explanatory of that act, as constituting a part of the *res gesta*. *Turpin vs. Brannon*, 3d M'C., 261. Hearsay, part of *res gesta*.

Presumptions

Are either *conclusive* or *disputable*. The first are settled rules of law, determining the quantity of evidence requisite for the support of any particular averment, which may not be overcome by any proof that the fact is otherwise. The second, are rules which, in the absence of opposing evidence, infer one fact from the proof of the existence of another, and which, once attaching from facts proved, throw the burden of proof of the contrary on the opposite party. 1st Greenleaf, 15 and 33.

Conclusive presumptions.

After twenty years possession of lands, a grant will be presumed, in the absence of other evidence, the date of the grant cannot be ascertained prior to an earlier period than the commencement of the possession. From lapse of time grants will be presumed.

1. *Sims vs. Meacham*, 2d Bailey, 101.

A continuous adverse possession of land for twenty years by different persons and at different times, is sufficient to raise the presumption of a grant. *McLeod vs. Rogers*, 2d Rich., 19.

When an authority is given by law to executors, administrators, clerks, or other officers, to make sales of lands, upon being duly required by the Courts, and they are required to advertise the sales in a particular manner, and to observe other formalities in their proceedings, the lapse of sufficient time, (which, in most cases, is fixed at thirty years,) raises a conclusive presumption that all the legal formalities of the sale were observed. 1st Greenleaf, sec. 20. Legal formalities.

The records of a Court of justice are presumed to have been correctly made; a party to the record is presumed to have been interested in the suit; and after verdict, it will be presumed, that those facts, Judicial records.

without proof of which the verdict could not have been found, were proved, though they are not expressly and distinctly alleged in the record; provided it contains terms sufficiently general to comprehend them in fair and reasonable interpretation. Ibid, sec. 19.

Consequences of one's act.

A sane man is conclusively presumed to contemplate the natural and probable consequences of his own acts; and therefore, the intent to murder is conclusively inferred from the deliberate use of a deadly weapon. So, the deliberate publication of calumny, which the publisher knows to be false, or has no reason to believe to be true, raises a conclusive presumption of malice. Ibid, sec. 18.

Estoppels

Estoppels may be ranked in this class of presumptions. A man is said to be estopped, when he has done some act, which the policy of the law will not permit him to gainsay or deny. Ibid, sec. 22.

In regard to *recitals in deeds*, the general rule is, that all parties to a deed are bound by the recitals therein, which operate as an estoppel, working on the interest in the land, if it be a deed of conveyance, and binding both parties and privies, privies in blood, privies in estate, and privies in law. Ibid, sec. 23.

Thus also, a grantor is, in general, estopped by his deed, from denying that he had any title in the thing granted. But this rule does not apply to a grantor, acting officially, as a public agent or trustee. Ibid, sec. 24.

So also, a tenant, and all claiming under him, are estopped from disputing the title of the landlord. *Anderson vs Darby*, 1st N. & M'C., 369; and *Love vs. Dennis*, Harper, 70.

Infants and married women.

Conclusive presumptions of law are also made in respect to infants, and married women. Thus, an infant, under the age of seven years, is conclusively presumed to be incapable of committing any felony, for want of discretion; and under fourteen, a male infant is presumed incapable of committing a rape. A female under the age of ten years is presumed incapable of consenting to sexual intercourse. Where the husband and wife have cohabited together, as such, and no impotency is proved, the issue is conclusively presumed to be legitimate, though the wife is proved to have been at the same time guilty of infidelity. And if a wife act in company of her husband, in the commission of a felony, other than treason or homicide, it is conclusively presumed, that she acted under his coercion, and consequently without any guilty intent. 1st Groenleaf, sec. 28.

Disputable presumptions.

As men do not generally violate the penal code, the law presumes

every man innocent ; but some men do transgress it, and therefore evidence is received to repel this presumption. This legal presumption of innocence is to be regarded by the jury, in every case, as matter of evidence, to the benefit of which the party is entitled. And where a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with any other rational conclusion. On the other hand, as men seldom do unlawful acts with innocent intentions, the law presumes every act, in itself unlawful, to have been criminally intended, till the contrary appears. Thus, on a charge of murder, malice is presumed from the fact of killing, unaccompanied with circumstances of extenuation ; and the burden of disproving the malice is thrown upon the accused. The same presumption arises in civil actions, where the act complained of was unlawful. So also, as men generally own the personal property they possess, proof of possession is presumptive proof of ownership. But possession of the fruits of crime, recently after its commission, is, *prima facie*, evidence of guilty possession ; and, if unexplained, either by direct evidence, or by the attending circumstances, or by the character and habits of life of the possessor, or otherwise, it is taken as conclusive. This rule of presumption is not confined to the case of theft, but is applied to all cases of crime, even the highest and most penal. Thus, upon an indictment for arson, proof that property, which was in the house at the time it was burnt, was soon afterwards found in the possession of the prisoner, was held to raise a probable presumption, that he was present and concerned in the offence. The like presumption is raised in the case of murder, accompanied by robbery ; and in the case of the possession of an unusual quantity of counterfeit money. Presumption of innocence.
From unlawful acts.
Possession.
In case of stolen goods.
Arson and robbery.
1st Greenleaf, sec. 34.

Presumptions from course of Trade.

Where a bill of exchange, or an order for the payment of money, or delivery of goods, is found in the hands of the drawee, or a promissory note is in the possession of the maker, a legal presumption is raised, that he has paid the money due upon it, and delivered the goods ordered. Possession of note, or bill of exchange.

So, a receipt for the last year's or quarter's rent, is *prima facie* evidence of the payment of all the rent previously accrued. But the mere delivery of money by one to another, or of a bank check, or the transfer of stock, unexplained, is presumptive evidence of the payment of an antecedent debt, and not of a loan. The same presumption Receipt.
Delivery of money.

Payment of draft. arises upon the payment of an order or draft for money, namely, that it was drawn upon funds of the drawer, in the hands of the drawee. But in the case of an order for the delivery of goods it is otherwise they being presumed to have been sold by the drawee to the drawee.

Order for goods.

Division of land. Thus, also, where the proprietors of adjoining parcels of land agree upon a line of division, it is presumed to be a recognition of the true original line between their lots. 1st Greenleaf, sec. 38.

Debt by specialty. On the same general principle, where a debt due by specialty has been unclaimed, and without recognition, for twenty years, in the absence of any explanatory evidence, it is presumed to have been paid. 1st Greenleaf, sec. 39.

The lapse of twenty years raises a presumption of payment, in the case of a judgement, as well as of a bond. *Quære*; Whether evidence of a plaintiff's punctuality, and of defendant's embarrassed circumstances, is admissible to raise a presumption of payment within twenty years. *Kennedy vs. ex'ors. of Denoon*, 2d Tr., 617.

Public duties.

Officers. The return of a sheriff, which is conclusively presumed to be true between third persons, is taken *prima facie* as true, even in his own favour; and the burden of proving it false, in an action against him for a false return, is devolved on the plaintiff, notwithstanding it is a negative allegation. In fine, it is presumed, till the contrary is proved, that every man obeys the mandates of the law, and performs all his official and social duties. The like presumption is also drawn from the usual course of men's private offices and business, when the primary evidence of the fact is wanting. 1st Greenleaf, sec. 40.

Private business.

Written documents, how proved.

Public records. All public records may be proved by copy, authenticated under seal, by the proper officer, for the great seal of the State, and the seals of its judicial tribunals, require no proof. Courts also recognise without other proof than inspection, the seals of State of other nations which have been recognised by their own sovereign. The seals also, of foreign Courts of Admiralty, and of notaries public, are recognised in the like manner. Public statutes, also, need no proof, being supposed to exist in the memories of all; but, for certainty of recollection, reference is had, either to a copy from the legislative rolls, to the book printed by public authority. 1st Greenleaf, 479.

Private writings. Private writings must be proved by the subscribing witnesses, there be any, or at least by one of them. But to this rule there is an

veral exceptions. The first is, where the instrument is thirty years ^{Deeds thirty years old.} old; in which case, it is said to prove itself, the subscribing witnesses being presumed to be dead, and other proof being presumed to be beyond the reach of the party. But such documents must be free from just grounds of suspicion, and must come from the proper custody, or have been acted upon, so as to afford some corroborative proof of their genuineness, and in this case it is not necessary to call the subscribing witnesses, though they be living. 1st Greenleaf, 570.

A second exception to this rule is allowed, where the instrument is ^{Produced by adverse party.} produced by the adverse party, pursuant to notice, the party producing it claiming an interest under the instrument. In this case, the party producing the instrument is not permitted to call on the other for proof of its execution; for, by claiming an interest under the instrument, he has admitted its execution. Ibid, 571.

If the witnesses to a will deny their attestation, or fail to prove the ^{Where witnesses deny, or fail to prove.} execution, circumstantial evidence may be adduced, and the most direct and usual, is, proof of their hand-writing; but such proof ought to be very clear. Pearson and others vs. Wightman, 1st M. C., 336.

If the subscribing witness to a note, on being sworn, should not prove it, it may be proved by other evidence. Vernon vs. Hammet; 1st Hill, 269.

Where the subscribing witness to a bond or note, cannot be produced, his hand-writing must be proved before plaintiff can prove the ^{By proving hand-writing of witnesses.} hand-writing of the obligor or maker of a note, notwithstanding the Act of 1802 allows the plaintiff to prove bonds or notes by other persons than the subscribing witnesses. Taylor ads. Meyers; 2d Bay, 506.

Where all the witnesses to a will, in order to pass lands, are dead, or out of the State, the hand-writings or signatures of all the three witnesses to its execution should be proved. Hopkins vs. Albertson; 2d Bay, 484.

Where the maker of a promissory note had made his mark to it, and the subscribing witness was out of the State, proof of the hand-writing of the subscribing witness was held sufficient. Bussey ads. Whitaker; 2d N. & Mc., 374.

The absence of a witness to any bond or note, shall not be deemed ^{Proof of signature of the party.} a good cause, by any Court of Justice, for postponing a trial respecting the same; but that the signature to such bond or note may be proved by other testimony; unless the defendant, at the time of filing his or her plea, shall swear, or affirm, according to the form of his religious profession, that the signature of the bond or note in suit is not his or

hers; nor in case the defendant or defendants should be executors or administrators, shall the cause be postponed for want of the subscribing witness to the bond or note in suit, but the signature may be proven by other testimony; unless one of the executors or administrators, who are defendants, shall swear, or affirm, as aforesaid, at the time of filing his or her plea, that they have cause to believe the signature to such bond or note is not the testator's, or intestate's, as the case may be. 5th S. L., 435.

It is sufficient proof of a defendant's signature, if a witness swear that he has seen defendant write, and that he believes it to be his hand-writing. *Comm. of the Poor vs. Hanion*; 1st N. & Mc., 554.

So also hand-writing may be proved by one who has seen letters or other documents of the party, and has *personally communicated* with him respecting them, or *acted upon them as his*, the party having known and acquiesced in such acts. 1st Greenleaf, sec. 577.

Comparison
admissible.

As a circumstance in aid of doubtful proof, comparison of hand-writing is admissible, but *per se* is inadmissible. *Adm. of Boman v. Plunkett*; 2d McC., 518.

In cases of
doubt.

Where there is conflicting testimony as to the genuineness of a signature, comparison of hand-writing is admissible, as confirmatory evidence, to enable the jury to decide upon which of the witnesses they could most confide. A bundle of notes that is admitted to prove the genuineness of a signature, by comparison of hand-writing, may be sent to the jury. *Robertson & Co. vs. Millar*; 1st McMullan, 120.

In ancient
writings.

When a writing is offered in evidence, so antiquated as to render it difficult if not impossible to produce a witness who had ever seen the person write, whose signature is in question, a comparison of hand-writing is allowable. *Cantey vs. Platt*; 2d McC., 260.

How far a written instrument may be explained or varied by parol evidence.

Inadmissible,
generally.

"Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument." 1st Greenleaf, sec. 275. So also, if a person make a verbal agreement, and afterwards enter into a written contract upon the same subject, the verbal agreement is merged in the written contract, and parol evidence cannot be admitted to prove any contract different from the written agreement. *Falconer vs. Garrison*; 1st McC., 209.

Admissible
to prove a
subsequent
contract.

A written agreement may be waived, and the terms of it varied, by a subsequent parol agreement—such parol agreement is not a contradiction of the original contract, nor an alteration of it, but a new subsequent contract. 1st Rice; Tit. Evi., 158.

Parol evidence is admissible to shew, that the time, specified in a written agreement for the delivery of goods sold, was subsequently enlarged by the parties : so, where no time was fixed by the written agreement, evidence was received to shew, that it was afterwards fixed by parol. *Neil vs. Cheves*, 1st Bailey, 537.

It may be shewn by parol, that after a submission in writing, the parties agreed that the arbitrators should have power to call in an umpire; such an agreement is a new and independent contract, and not a variance of the written submission.

A submission, in writing, to abide by the award "of the arbitrators now about to sit," may be shewn by parol, to have been intended at the time as a submission to certain individuals as arbitrators, with power to call in an umpire. It is rendering certain by parol, that, which the parties did not intend to make certain by the writing. *Sharp vs. Lipsey*; 2d Bailey, 113.

Parol evidence is inadmissible to vary, or contradict, a written agreement, entered into upon an adjustment of accounts between the parties. If evidence were offered of a mistake in the settlement, it would be admissible, even in an action upon a sealed note given for the balance. *Boyce vs. Foster*; 1st Bailey, 540. Mistake.

A party cannot at law, by parol testimony, shew a different consideration from the one expressed in a deed; but it may be admitted, *if seems*, to shew a greater or less of the same character. *Garrett vs. Stuart*, 1st McC., 514. Consideration.

Parol evidence is admissible to shew that the true consideration for the purchase of a tract of land was greater than that specified in the deed. *Curry vs. Lyles*; 2d Hill, 404.

If the language of the instrument is applicable to several persons, to several parcels of land, to several species of goods, to several monuments or boundaries, to several writings; or the terms be vague and general, or have divers meanings, as, "household furniture," "stock," "freight," "factory prices," and the like; or in a will, the words, "child," "children," "grand-children," "son," or "nearest relations," are employed; in all these and the like cases, parol evidence is admissible of any extrinsic circumstances, tending to show what person or persons, or what things, were intended by the party, or to ascertain his meaning in any other respect. 1st Greenleaf, sec. 288. Surrounding circumstances.

In regard to receipts, it is to be noted, that they may be either mere acknowledgements of payment or delivery, or, they may also contain a contract to do something in relation to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge Receipts.

payment or delivery, it is merely *prima facie* evidence of the fact, and not conclusive; and therefore the fact, which it recites, may be contradicted by oral testimony. But in so far as it is evidence of a contract between the parties, it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol. *Ibid*, see 305.

EXAMINATION.

Of prisoner. Formerly by statute 2 and 3 P. & M., c. 10, the magistrate before whom a prisoner is brought, was bound immediately to examine the circumstances of the crime alleged, and to this end he is to take writing the examination of such prisoner, and the information of the who bring him.

Not necessary.

But by the Act of Assembly of 1839, p. 15, sec. 10; "it shall not be necessary for any magistrate, when any prisoner is produced before him for commitment or bail, on a charge of felony, to examine such prisoner, and those who bring him as heretofore prescribed by law such magistrate may take the examination of any witness in behalf of the State, in the presence of such prisoner, allowing such prisoner the right of cross examination, and reduce the testimony so taken to writing, read the same over to the witness, and require him to subscribe it; and the magistrate shall return the testimony thus taken to the office of the clerk."

1st. THE EXAMINATION OF THE PRISONER.

2d. THE EXAMINATION OF THE WITNESSES.

3d. OF THE COMMITMENT PENDING SUCH EXAMINATION, AND FINAL PROCEEDING.

1st. *The Examination of the Prisoner.*

Though by the Act of 1839, it is no longer obligatory on the magistrate to examine the prisoner, yet it were better that this ancient and established course be pursued, as the bearing of what the prisoner may say for or against himself, will probably furnish useful information in the investigation of the case.

Not on oath. He must not be examined on oath, for this would be a species of duress, and a violation of the rule, that no one is bound to criminate

himself. And where such examination purports upon its face to have been taken on oath, it will be rejected; nor will parole evidence be admissible to prove that no oath had in fact been administered.

2 Starkie, Evi. p. 30.

It is not ~~absolutely~~ incumbent on the magistrate to warn the prisoner not to confess. Ibid. But as it must appear that his statement was not made under the influence of fear or hope of favour, in order to be admissible, from motives of caution, it is usual for the magistrate to warn the prisoner that his statement may be read against him, and that he is not bound to answer unless of his own free choice.

Not bound to warn.

The examination should be taken down in writing, for so the statute directs, and though it has been held that the substance thereof may be proved by parole, if not reduced to writing, yet as the presumption of law is, that the magistrate did his duty, it will always be presumed that the statement of the prisoner was taken as the statute directs, until the contrary is made to appear.

To be taken in writing.

All that the prisoner states, should be taken as nearly as possible in his own words; for though the statute merely requires that which is material to be taken down, or so much as goes to make out the felony, yet the magistrate may not know at the time how slight a matter may prove material, and justice requires that the prisoner's statement should not be garbled.

Whole statement.

The writing should be signed by the prisoner and the magistrate, and if the prisoner refuse to sign, yet if he acknowledge it as correct, it may still be evidence against him.

Signing of prisoner.

2d. Examination of Witnesses.

It was evidently the intent of the Act of 1839, that the examination of witnesses, directed by that statute, is to perpetuate the testimony thus taken, so that in the case of the death of a witness before the trial, his testimony may not be lost. It is important, that the examination shall plainly appear to be taken according to the directions of the act, namely,

Rules under the act.

- 1st. It should be taken in the presence of the prisoner.
- 2d. He should be allowed the right of cross-examination.
- 3d. It should be reduced to writing, read over to the witness, and subscribed by him.

It seemeth just and right, that the justices who take information against a felon, or person suspected of felony, should also take and certify such evidence as goeth to the acquittal of the prisoner. Dalt.,

For prisoner.

3d. Of commitment pending such examination, and final proceeding.

Detainer by
word of
mouth.

If, by some reasonable occasion, the magistrate cannot, at the return of the warrant, take the examination, he may, by word of mouth, command the constable or other person to detain the prisoner in custody till the next day, and there to bring him before him for further examination. And this detainer is justifiable by the constable or other person, without shewing the particular cause for which he was to be examined, or any warrant in writing. 1 H. H., 585.

Reasonable
time.

But the time of the detainer is no longer than is necessary for such purpose, for which it is said that the space of three days is a reasonable time. 2 Haw., 119.

After examination, the magistrates may bail, if the offence be bailable, or he may commit; and whatever doubts there may have been, formerly, as to his right to discharge, it is now settled by Act of 1839, p. 15, sec. 6, that if it clearly appear upon examination, that the charge is not founded in probability, the party may be discharged.

*Precedents.**Examination of the Prisoner.*

STATE OF SOUTH-CAROLINA, }
District. }

The examination of A. B., of district, in the said State, taken before me, C. D., magistrate for the said district, on the day of in the year He, the said having been brought before me, charged with and being first warned that he is not bound to criminate himself, and that he is to expect no favour therefrom; nevertheless upon his examination, now taken before says, (here follow the words of the prisoner.)

A. B.

Taken and subscribed before }
me, the date as above. }

C. D.,

Magistrate.

Examination of Witnesses.

STATE OF SOUTH-CAROLINA, }
District. }

E. F., a witness on behalf of the State, being duly sworn and ex-

amined in the presence of A. B., and cross-examined by him, deposes and says, (here state the testimony in full.)

E. F.

Sworn to and subscribed, after being read }
to the witness, before me, this day of }
C. D.,
Magistrate.

EXECUTION.

1st. IN CIVIL CASES.

2d. IN CRIMINAL CASES.

1st. In Civil Cases.

By Act of 1839, p. 18, sec. 15; if a demand, or any part thereof, be sustained on trial before a magistrate, he shall give judgement therefor, together with the costs, and having entered the same in his book, may issue his execution for such amount so adjudged, directed to any constable of the said State, by virtue of which the same may be levied of the goods and chattels of such defendant in execution liable therefor, wheresoever the same may be found within the State, at any time within one year from the date thereof, and not afterward; (now extended to four years, Act 1847, 433;) and in case the said execution be returned not satisfied, with the cause thereof, to the same or nearest magistrate, on the oath of the proper officer, such magistrate may, at any time within four years, and on giving five days notice to the defendant, issue an *alias*, and in like manner a *pluries* execution, on being satisfied that the same is yet due.

Execution may issue immediately after judgement, unless notice of appeal be given, in which case the party appealing, is entitled to two days to give bond and security.

Execution may be sued out upon a judgement in a Magistrate's Court, at any time within a year and a day, and a new action cannot be brought out within that period. *Lee vs. Giles*, 1 Bail., 449.

A magistrate's execution has no lien until it is levied, and therefore a levy and sale under a magistrate's execution will not divest the lien of an execution from a Court of record. *Robinson vs. Cooper*, 1 Hill, 286.

Also, in the case of *Kerr vs. Montgomery*, 1 Hill, 277, it was held.

that a sale under a magistrate's execution, of property bound by executions in the sheriff's office, confers no title.

Levy and sale.

In every case where an execution or attachment is levied, the constable shall specify by indorsement on the execution or attachment, or by schedule thereto annexed, a list of every article so levied on, and forthwith lodge a copy of such list with the person issuing the process under which he acts; and in all cases of sale by a constable, he shall give ten days notice, by advertisement, at two of the most public places in the neighborhood, of the time and places of sale. Act 1839, p. 56, sec. 5.

By sec. 12, same Act; no constable shall levy any execution upon a slave, provided he can find other personally liable to levy and sale, sufficient to satisfy the demand.

Articles exempt from levy.

By Act of Congress of 6th May, 1792, the arms and accoutrements of a militia man, viz: a musket or firelock, bayonet and belt, two spare flints, a knapsack, pouch and box, are exempted from all suits, distress, executions or sales, for debt or the payment of taxes.

By Act of Assembly, 1794, 8 S. L., 489, the horse of a trooper, his arms and accoutrements, are exempt from seizure. But to exempt said horse under the statute, he must be registered with the captain of the company.

Other articles exempt from execution are, to each family, two beds, with necessary bedding; two bedsteads; one spinning wheel, and two pair of cards; one loom and one cow and calf; if a farmer, the necessary farming tools; if a mechanic, the tools of his trade; the ordinary cooking utensils, and \$10 worth of provisions. 6th S. L., 214.

A magistrate may in no case issue execution against the body. Cheves, R.

Form of an Execution.

STATE OF SOUTH-CAROLINA, }
District. }

By A. B., Magistrate in and for the said State.

To any lawful Constable.

You are hereby commanded, that without delay, of the goods and chattels of C. D., you levy the sum of dollars, cents, which E. F. before me did recover for a debt, also costs.

Given under my hand and seal, the day of A. D., one thousand eight hundred and

Statement:

Debt, \$

Costs,

A. B. [L. s.]

2d. In Criminal Cases.

All and every constable and constables in the several parishes of his State, where any slave be sentenced to suffer death or other punishment, shall cause execution to be done of all the orders, warrants, precepts and judgements of the justices appointed to try such slaves. And that no delay may happen in causing execution to be done, the constable is authorized to press one or more slave or slaves in or near the place where such punishment is to be inflicted, and such slave or slaves, so pressed, shall be obedient to and observe all the orders of the constable, in and about the premises, upon pain of being punished by the said constable, by whipping on the bare back, not exceeding twenty lashes, which punishment, the said constable is hereby authorized and empowered to inflict. And the constable shall, if he press a negro, pay him five shillings out of his fee, for doing said execution. A. A., 1740; 7th S. L., 404.

Constable shall execute

Power to press assistants.

On the conviction of a slave, for any offence not capital, the punishment shall be whipping, confinement in the stocks, or tread mill, and not otherwise; and on conviction of a free person of colour, for a like offence, the punishment shall be whipping, confinement in the stocks, tread mill, or prison, or fine, and not otherwise; and on conviction of a slave, or free person of colour, for a capital offence, the punishment shall be hanging, and not otherwise. 6th S. L., 489.

Kind of execution.

When any slave or free person of colour shall be sentenced to death, sufficient time shall be allowed to permit an appeal to be made, as is provided in the third section of the act, entitled, "An Act to abolish certain punishments, and amending the law for the trial of slaves and free persons of color," passed in December, 1833; and such report of the case shall be made by the magistrate as is therein prescribed; and in all cases, a sufficient time shall be allowed to apply to the Governor for a pardon. A. A., 1839, p. 23, sec. 28.

Time allowed to appeal, or apply for pardon.

It is clear, that if upon a judgement to be hanged by the neck until he is dead, the criminal be not thoroughly killed, but revives, he must be hanged again, for the former hanging was no execution of the sentence, and if a false tenderness were to be indulged in, in such cases, number of collusions might ensue. Nay, even while abjurations are in force, a criminal, so reviving, was not even allowed to take sanctuary and abjure the realm, but his fleeing to a sanctuary, was held an escape in the officer. 4 B. C., 406.

If he revive, must be hanged again.

If a woman, quick with child, be condemned either for treason or felony, she may allege her being with child in order to get the execution respited, and therefore the officer shall be commanded to take her

woman quick with child, respited.

into a private room, and impanel a jury of matrons to try and examine whether she be quick with child or not, and if they find her quick with child, the sentence shall be respited until her delivery. But a woman cannot demand such respite of execution by reason of her being quick with child more than once. It also seems that she shall have no advantage from being found with child, unless she be found quick with child. 2 Haw., 463, 464.

Where a
person
becomes
insane.

Another reason of regular reprieve, is, where a person becomes insane, between the judgement and the award of execution. For regularly, though a man be *compos* when he commits a crime, yet if he become *non-compos* after it, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgement; if after judgement, he shall not be ordered for execution. 1st Tomlins; Title Execution.

Where time
passes.

If the day appointed for execution should elapse before execution done, a new time maybe appointed. This new time may be appointed by the Court which tried the offender, or by the King's Bench; (here by the Sessions.) 1 Tomlins, 715.

Warrant of Execution.

STATE OF SOUTH-CAROLINA, }
District. }

Whereas, A. , slave of , (or free person of color) before me, (C. D.,) presiding magistrate, and freeholders, was convicted of and sentenced to be kept in close confinement until the day of , and then between the hours of of the said day, to be hanged by the neck until be dead.

To any lawful Constable.

You are hereby authorized and required to keep the body of the said in close confinement until the day of , and between the hours of and of the said day, to cause the said to be hanged by the neck until he be dead.

Given under my hand and seal, this day of , in the year of our Lord, one thousand eight hundred and

C. D., [L. s.]
Magistrate.

EXPOSING THE PERSON.

Exposing the person to public view, or with intent to insult a female, is an indictable offence, for which the party may be punished by fine and imprisonment. 2 Camp., 89; 2 Stra., 789; 1 Sid., 168.

EXTORTION.

1st. WHAT IS.

2d. ITS PUNISHMENT.

1st. *What is Extortion.*

Extortion, says Lord Coke, signifies any oppression by colour or Generally. pretence of right; and in this respect it is said to be more heinous than robbery itself. To this may be referred the exaction of unlawful usury, winning by unlawful games, and in a word, all taking of more than is due by colour or pretence of right; as excessive toll in millers, excessive prices of ale, bread, victuals, wares, &c.

But in a strict sense, it signifies the taking of money by an officer, In a strict sense. by colour of his office, either where none is due, or not so much is due, or where it is not yet due. 2 Burn., J., 134.

It is generally agreed, that no public officer shall take any other General rule. fees or rewards, for doing any thing relating to his office, than some statute in force gives him, or has been anciently and usually taken; and if he do otherwise, he is guilty of extortion. Dalt., c. 41.

It seems that an officer who takes a reward that is voluntarily given Taking a voluntary reward. him, and which has been usual in certain cases, for the more diligent or expeditious performance of his duty, cannot be said to be guilty of extortion. 2 Inst., 210.

But a promise to pay such reward, however freely and voluntarily made, is void. 1 Haw., 171.

2d. *Its Punishment.*

At the Common Law, this offence is severely punishable, at the suit of the State, by fine and imprisonment, and also by a removal from the office, in the execution whereof it was committed.

If any person entitled to fees by this act, and in the lists therein mentioned, shall take or receive any further, other or greater fee or reward, for any of the services therein mentioned, or shall invent or

contrive any other or further fee or reward for any of the said services; in every such case the person so offending shall, on conviction, forfeit for the first offence, four times the amount of the sum so taken, paid or received, to be recovered in any Court of record; one half to the person suing for the same, and the other to the public treasury for the State; except where County Courts are established, when the said last mentioned moiety shall be for the use of the county: and for the second offence, shall be divested of his office, and be rendered incapable of reappointment to the same. And on information from the Court, under hand and seal, the Governor shall fill up the vacancy, if the Legislature should not be sitting; and if in the County Courts, the vacancies shall be filled up by the justices of the said county. Sec. 3, of A. A., 14th February, 1791.

Penalty
under Acts
of 1827 and
1839.

By Act of 1827, 6th S. L., 336; If any officer therein named shall wilfully or ignorantly charge any other or higher fees than those therein recited, such officer shall be liable to forfeit to the party injured, ten times the amount of the excess of fees so improperly charged, to be recovered by suit in the Court of Common Pleas, in which no imparlance shall be granted; and by Act of 1839, p. 11, any officer named therein, who shall charge any other fees, or for any other services than those therein recited, shall forfeit as above provided, to be recovered in the same manner, or by rule, when the penalty does not exceed twenty dollars.

EYE, PUTTING OUT.

[See MAYHEM.]

FALSE IMPRISONMENT.

Is an assault.

An unlawful imprisonment is an assault, for it is a wrong done to the person of a man, for which, besides the private satisfaction given to the individual by action, the law also demands public vengeance, as it is a breach of the peace.

What
amounts to
an unlawful
imprison-
ment.

To constitute the injury of false imprisonment, there must be an unlawful detention of the person, either by confinement in a common prison, in a private house, or by forceable detention in the streets.

and the detention will be unlawful, though the party have a regular process, if it be executed at an unlawful time, as on Sunday. 1 Russ. 1, 607.

F E E S .

1st. AMOUNT OF FEES. *

2d. BY WHOM PAID.

3d. CHARGES AGAINST THE STATE, HOW RECOVERED.

1st. Of Magistrates.

		Amount of Fees.
Oath and warrant in criminal cases,	\$00 43	
Each recognizance and return,	43	
Commitment,	21	
Administering and certifying oath in writing,	32	
<i>Habeas Corpus</i> , to each magistrate,	75	
Issuing summons and copy to the defendant,	37½	
Summons for witness,	21	
Taking examination of a witness in writing, in any case as prescribed by law,	50	
Giving judgement on hearing litigated case,	25	
Do. do. in case not defended,	18	
Issuing execution or renewal,	25	
Report of case, and taking bond to appeal,	62½	
Issuing attachment, returnable to Court or magistrate, including all notices,	1 00	
Filing return of garnishee, and order thereon,	12½	
Proceedings between landlord and tenant, to the two magistrates jointly,	10 00	
Proceedings in forcible entry and detainer,	10 00	
Proceedings against vagrants, and report,	2 00	
Certifying indenture of apprentice, or assignment,	1 00	
Trial of slaves or free persons of color, including all charges, in capital cases,	2 00	
Not capital,	1 00	
Coroner's inquest,	8 50	
Mileage on same, (if over five miles,) going and returning, per mile,	5	
Each warrant issued,	50	

LAW OF MAGISTRATES.

Each commitment,	\$00 50
Each recognizance,	75
Each body disinterred,	3 00
Recording proceedings in his book, per copy sheet of ninety words,	12
Proceedings on estray of horse or mule,	50
Other estray,	12½
Taking and certifying renunciation of dower or inheritance,	2 00
Granting order for special bail,	50
Hearing and determining application under prison bounds act,	2 00
Patrol warrant,	43
Distress warrant,	43

Provided that nothing herein contained, shall authorize or empower any magistrate to receive any fee whatsoever for his services, in any proceeding in causes small and mean, where the amount for which the summons shall be issued, shall be one dollar and fifty cents, or under. A. A., 1840, p. 105.

That nothing in this Act shall be construed to alter, abrogate, or interfere with the practice or fees, as now established by law for the magistrates of the parishes of St. Philip's and St. Michael's. Provided, that the fees to be charged to the State, be uniform throughout the State. Ibid, p. 106.

The fees of magistrates in St. Philip's and St. Michael's, therefore, remain as provided by the Act of 1833 and 1839, p. 23, and are as follows :

Fees in St. Philip's and St. Michael's.	Oath and warrant in criminal case,	\$00 50
	Each recognizance,	50
	Commitment,	50
	Administering and certifying oath in writing,	37½
	Writ of <i>habeas corpus</i> to each magistrate,	75
	Summons to defendant in civil case,	50
	Summons to witness,	25
	Taking examination of witness in writing, in any case as provided,	50
	Giving judgement in litigated case,	50
	Not litigated,	25
	Issuing execution or renewal,	25
	Report of case, and taking bond to appeal,	1 00
	Issuing attachment returnable to magistrate, including all notices,	1 00
	The same, returnable to Court,	2 00

return of garnishee and order, - - - -	\$00 25
processes between landlord and tenant, - - - -	10 00
return, and returning report, - - - -	2 00
indenture of apprentice, or assignment, - - - -	2 00
slaves and free negroes, in capital case, - - - -	4 00
inquest, same as above. - - - -	2 00
horse or mule, proceedings, - - - -	1 00
strays, - - - -	50
inheritance, taking and certifying renunciation of, - - - -	2 00
will, order for, - - - -	1 00
inquests, hearing and determining application for, - - - -	2 00

Constables Fees.

grand jury in case of landlord and tenant, - - - -	\$10 00
Coroner's jury, and witnesses, - - - -	2 14
summons, rule or notice, by a magistrate, in a civil case, (no mileage), - - - -	50
attachment, inventory and return, - - - -	1 00
commission on sale, 5 per cent. - - - -	
slave or free negro, - - - -	5 00
for other corporal punishment, - - - -	75
distressing, 5 per cent. - - - -	
levy, advertisement, and paying over proceeds, (besides 5 per cent.) - - - -	21
engaged on search warrant, - - - -	1 00
in any State case, - - - -	1 00
commissions on all sums levied, 5 per cent. - - - -	
each witness in civil case, - - - -	21
each juror and witness on trial of slaves or free persons of colour, - - - -	21

2d. By whom payable.

cases, by summons or distress, proceedings between landlord and tenant, in forcible entry and detainer, the unsuccessful defendant is liable for the fees; but in case the decree, or verdict, be against the defendant, and he be unable to pay, then the plaintiff is liable to pay the same. 6th S. L., 486. A. A., 1839, pp.

in criminal cases, except in case of slaves, the fees of magistrates and constables must be paid by defendant, if found guilty. If

guilty, or the proceeding be stopped at the instance of the State, or the grand jury find no bill, or the attorney *nol. pros.*, or the defendant be unable to pay, then if the said costs have not been paid by the prosecutor, they will be paid by the State. 6th S. L., 387. A. A., 1840, p. 106.

Charged to
to the State.

The fees for the prosecution of slaves, are in all cases to be charged to the State, except in case of search warrant, to be paid by the party complaining; Act 1840, 106. And in the parishes of St. Philip's and St. Michael's, where the Court shall think the prosecution groundless and malicious, it may order the prosecutor, if able, to pay the costs.

3d. Charges against the State, how recovered.

By resolution of the Legislature, *Resolved*, That in future all accounts exhibited against this State shall have every charge therein clearly defined, and shall be presented on or before the first day of November next; and also on or before the first day of November in every succeeding year, to the treasurers, either at Columbia or at Charleston, whose duty it shall be to audit the same, make their remarks on each, and lay them before the legislature, on the first day of their next meeting thereafter.

Resolved, That in future, all accounts exhibited against this State, shall be certified by such officers only as are known in law, and who directed the respective duties and services to be performed for the public; and said accounts shall also be attested, which attestation shall be subscribed to by the parties making the demands, and to be as follows:

District. }

Personally appeared [*the party's name*] before me, [*the magistrate's name*] who after being duly sworn upon the Holy Evangelists of Almighty God (*or affirm, as the case may be*) and saith, that the above (or within) account of dollars and cents, is truly and justly due him from the State of South-Carolina, and that he has never received any part thereof, either by discount or otherwise, directly or indirectly. Witness my hand.

A. B.

Sworn before me, this day of

C. D., Justice of the Peace.

Resolved, That in future, all accounts against this State, that are not delivered in, and authenticated in the manner prescribed by the above resolutions, shall not be provided for in the tax-bill of that year. *Winke*, p. 501.

By the Act of 1829, 6th S. L., 387; The oath of the magistrate within the Parishes of St. Philip's and St. Michael's, as to the services rendered, and as to his belief of the inability of the prosecutor, or party liable for costs, to pay them, accompanied by the certificate of the clerk of the Court, where the proceeding have been returned into Court; and in the case of the constable, his oath and the certificate of the magistrate and clerk of the Court, shall be sufficient to entitle the parties to payment from the Legislature.

F E L O N Y .

[For proceeding in, and punishment of; see MURDER, BURGLARY, LARCENY, &c.]

The term felony has been long used to denote the class of crime committed, rather than the forfeiture occasioned by the crime, according to its original signification. Properly, it is an offence which occasions a total forfeiture of lands, or goods, or both, at the Common Law, and to which capital or other punishment may be superadded, according to the degree of guilt. Capital punishment does, by no means, enter into the true definition of felony, but the idea of felony is so generally connected with capital punishment, that it is hard to separate them, and to this usage the interpretations of the law have long conformed. Therefore, if a statute make a new offence felony, the law implies that it shall be punished with death, unless the offender prays benefit of clergy, to which all felons are entitled once, unless it be expressly taken away by statute. 1st Russel, 42. Definition.

With regard to felonies, created by statute, it seems clear that not only those crimes which are made felonies in express words, but also those which are decreed to have or undergo judgement of life and member by any statute, become felonies thereby, whether the word felony be omitted or mentioned. And where a statute declares, that the offender shall, under the particular circumstances, be deemed feloniously to have committed the act, it makes the offence a felony, and imposes all the common and ordinary consequences attending a felony. Ibid. What words in a statute create a felony.

If a felony be committed, and the felon fly from justice, or a dangerous wound be given, it is the duty of every man to use his best

endeavors to prevent an escape, and in such cases, if fresh suit be made, and if hue and cry be raised, all who join in aid of those who began the pursuit, will be under the same protection of the law; and the same rule holds, if a felon, after arrest, break away, as he is being carried to jail, and his pursuers cannot retake him without killing him. Thus where, upon a robbery, committed by several, the party robbed raised hue and cry, and the country pursued, and one of the pursuers was killed by one of the robbers, it was held that this was murder, for the country, upon hue and cry levied, are authorized to pursue and arrest the malefactors; and that, although there was no warrant of a justice to raise hue and cry, and no constable in the pursuit, yet the hue and cry was a good warrant in law for the pursuers to apprehend the felons. 1st Russell, 502.

Private
persons.

But where private persons use their endeavors to bring felons to justice, some caution ought to be observed; in the first place, it should be ascertained that a felony has been committed, or actually attempted by the party arrested; for no suspicion, however well founded, will bring the person endeavoring to arrest, without warrant, under the protection of the law; but a person detected in an attempt to commit a felony, may be detained without warrant, until he can be carried before a magistrate.—Ib. See also, COMPOUNDING and MISPRISON.

F E M E .

[See WOMEN.]

F E N C E S .

What a
lawful fence.

All fences strongly and closely made of rails, boards, or posts and rails, or of an embankment of earth, capped with rails or timber of any sort, or live hedges, five feet in height, measured from the level or surface of the earth, shall be deemed a lawful fence. 6th S. L., 331.

Navigable
stream
deemed
sufficient.

Every planter shall be bound to keep such lawful fence around his cultivated grounds, except where some navigable stream or deep water course shall be the boundary of such cultivated grounds, in which case, such stream shall be deemed a sufficient fence. *Provided*, that

Proviso.

before one can avail himself of this act, he shall apply to a magistrate of the district or parish, who shall from the names of seven freeholders of the vicinage, draw by lot three, who are required to view the premises, and pronounce upon the sufficiency of the said water as an enclosure, according to the true intent of this act.—Ibid.

If any horses, mules, cattle, hogs, sheep, or goats, shall break into any field, enclosed according to the directions of this act, having a crop of any growing or ungathered grain, they may be seized and kept confined until notice is given, within twenty-four hours after seizure, to their owner, his agent, or overseer, who shall be bound to pay the owner of said field fifty cents per head for each horse or mule, and twenty-five cents per head for every head of cattle, hogs, &c., before he shall be entitled to have such animal delivered up to him.—Ib., 332.

Horses, &c., breaking in, may be seized.

Penalty.

For the second breaking of the fields of the same person, by the horses, mules, &c.; of the same owner, within one month after the first, the owner shall be liable to the party injured for all damages sustained, in addition to the fine aforesaid, to be recovered by action of trespass, in which the plaintiff shall be entitled to full costs, if verdict or decree shall exceed four dollars. If it should appear that the fence was not a lawful one, the verdict shall be for the defendant.—Ib.

Second breaking.

If any person whose fields are not enclosed by a lawful fence, shall kill, wound, maim, chase, worry, or in any manner injure any horses, mules, cattle, hogs, sheep or goats, which shall be found in such fields, whether cultivated or not, or shall cause or procure the same to be done by any other person, whether a slave or a freeman, such person so offending, shall be liable to an action of trespass, and the plaintiff shall recover full satisfaction for the injury, with costs, if the verdict exceed four dollars.—Ibid.

Penalty for injuring animals.

If any slave shall hereafter kill, maim, wound, or injure any horse, mule, cattle, hog, sheep, or goat, not belonging to his owner, in any cultivated or uncultivated field, not enclosed by a lawful fence, he or she shall be liable to be apprehended, and on conviction by a magistrate and two (by Act 1839, changed to five) freeholders, shall be punished by whipping, not exceeding thirty-nine lashes.—Ibid.

Penalty on slave for a like offence.

FERRIES AND BRIDGES.

1st. HOW AND WHERE BRIDGES AND FERRIES MAY BE ESTABLISHED.

2d. OF THE DUTIES, LIABILITIES, AND RIGHTS OF THE OWNER OR KEEPER.

3d. RATES OF COLLECTING TOLL, AND OF PERSONS EXEMPT.

4th. FINES AND PENALTIES, AND HOW RECOVERED.

1st. *How and where Established.*

None to be established without six months notice.

By Act of 1809, 9th S. L., 443, no road, bridge, or ferry, shall hereafter be established by law, unless the person or persons petitioning for the same, shall have given notice to the Commissioners of Roads in the district or districts in which the said road, bridge, or ferry is to be established, at least six months before the session of the Legislature, and shall bring to the Legislature a certificate of the same from the Board of Commissioners.

Nor re-chartered without three months notice.

No ferry, the charter of which shall have expired, shall be rechartered by the Legislature, unless the person or persons so applying, shall advertise his intention of doing so, within three months previous to the meeting of the Legislature, to which such application shall be made, and at three of the most public places in the neighborhood of the said ferry. 9th S. L., 569.

The right to establish in the Legislature.

The right to establish ferries is an incident of sovereignty, and no individual has a right to establish one without permission of government, and the owner of one, thus established, is protected in his right, and if another set up a ferry near to his, without public authority, he may maintain an action on the case against him for a nuisance. Stark ads McGowen, 1 N. & Mc., 387.

Also, the State may proceed by *quo warranto*. Blisset vs. Hart; Willes, 512.

On what conditions ferries may be suppressed

Whenever after 1827, a ferry may be chartered for a term of years, or in fee simple, and the public interest may require a bridge to be erected thereat, and that the ferry should be suppressed, the Legislature may erect the same, or grant a charter for that purpose, and suppress the said ferry after the expiration of one year from the date of the act, declaring the suppression, on condition that the whole amount and one hundred per cent. advance, expended in making the road and landing to the said ferry, be paid to the proprietor.

Lands may be taken at a valuation.

Whenever, by the authority of the State, any lands are required to be surrendered by an individual, to an individual or company, for the

LAW OF MAGISTRATES.

construction of any bridge, turnpike, or other road, or keeping any ferry, and the same cannot, for the want of agreement of the parties as to price, or for any other cause, be purchased of the owner, the same may be taken at a valuation to be made by commissioners, or a majority of them, to be appointed by the Court of Common Pleas of the district where any part of the land may be situated. And the said commissioners, before they act, shall severally take an oath before some justice of the peace, faithfully and impartially, to discharge the duty assigned them. 6th S. L., 312.

In making the said valuation, the said commissioners shall take into ^{v.} consideration the loss or damage which may occur to the owner or ^{bc} owners, in consequence of the said land being taken, and also the benefit or advantages which he, she, or they, may receive from the erection of said works, and shall state particularly the value and amount of each, and the excess of loss and damage over and above the benefit and advantage, together with the actual value of the soil taken, or to be taken, shall form the measure of the valuation of the said land.—Ibid, 313.

The proceedings of the said commissioners, accompanied by a full description and plat of the said land, shall be returned under the hands and seals of a majority of the said commissioners, to the Court from which the commission issued, there to remain of record.—Ib.

In case either party to the said proceedings shall appeal from the ^{Nr.} said valuation to the next session of the Court, granting the commis- ^{tk} sion, and give notice to the opposite party thereof, the Court shall ^{ap} order a new valuation to be made by a jury, who shall be immediately charged therewith, and their verdict shall be final and conclusive between the parties, unless a new trial shall be granted by the Court of Appeals; and the land so valued by the commissioners or jury, shall vest in the individual or company, in fee simple, so soon as the valuation thereof may be paid, or, when refused, may be tendered.—Ib.

Where there shall be an appeal from the valuation of commis- ^{Hr.} sioners, entered by either of the parties, the same shall not prevent ^{pr} the works intended to be constructed on the land, from proceeding; ^{ca} but where the appeal is made by the party requiring the surrender, ^{ap} he shall be at liberty to proceed in his work on the said land, only on condition that he shall have given to the opposite party, a bond, with good security, to be approved of by the clerk of the Court where the valuation is returned, in a penalty equal to double the said valuation, and interest, in case the same is sustained, or in case it is reversed,

for the payment of the valuation, to be made by the jury and confirmed by the Court.—*Ib.*

Distance
between
ferries.

The distance within which one ferry may not be established in the vicinity of another, depends upon the charter of the ferry first established; but if there be no protection in a charter fixing a precise distance, yet, at common law, "no one may erect a ferry on a river so near an ancient ferry as to draw away its custom;" and in the case of *Stark and M'Gowen*, before referred to, it was held, that there was no difference between ancient ferries, and those by express grant. In all cases where a distance is fixed by charter, it is to be measured by water, or the approachable road. 9 S. L., 399.

Legislature
may grant
within any
distance.

By Act of 1827, 6th S. L., 307, no grant of a bridge, ferry, or turnpike road, shall prevent the Legislature from making further grant of bridges, ferries or turnpikes, within any distance of the same whenever the convenience of the community may require such further grants. But every grant of a ferry, bridge or turnpike, shall exclude all other persons from erecting and keeping up any bridge, ferry, or road, except for their own use, which may reduce the profits of such chartered bridge, ferry or turnpike, without the authority of the Legislature expressed by act.

2d. Duties and liabilities of owner and keeper.

The owner of a ferry is obliged to make a sufficient ferry boat with aprons attached, or an abutment or inclined plane at the landing place; (9th S. L., 544.) To keep employed a white ferryman; (3d S. L., 626.) To keep in good order the banks of the river or creek; (9th S. L., 443.) To transport citizens at all times of the night or day; (9th S. L., 312.) To keep fixed up in some conspicuous place their rates of toll; (*Ibid*, 396.)

The owner of a bridge, which may be destroyed by freshet, is authorized to establish a ferry in lieu thereof, provided the rebuilding of the said bridge be commenced in six months, and completed within two years from the time of its destruction. 9th S. L., 594.

Not repair-
ing, liable to
indictment.

He is required to have a sufficient railing, extending twenty feet from the ends of his bridge, on each side of the road leading thereto. *Ibid*, 528: and for not keeping his work in such condition as to answer the ends of its creation, is liable to indictment. 6th S. L. 315.

Liability.

For neglect of any of his duties, the owner of a ferry is not only subject to the fines and penalties hereinafter specified, but is also answerable in damages for any loss or injury, except they result from

the act of God, or the enemies of the State. *Cook vs. Gourdin*, 2 N. & M'C., 19.

As a remuneration for these services and liabilities, he is allowed ^{Rights.} a fixed rate of ferriage. He is exempt from militia duty, even in time of war; and he and his slaves employed at his ferry are exempt from road duties. *Cook vs. Gourdin*, 2 N. & M'C., 19; and 9th S. L., 515.

3d. Rates of, and collecting toll, and of persons exempt.

By Act of 1827, 6th S. L., 307, sec. 4; the proprietor or proprietors of any bridge, ferry, or turnpike road, shall not be permitted to receive in tolls or ferriage, for his, her, or their own use, more than double the established legal interest of the State, at the time of such receipt, on the capital invested in such bridge, ferry, or turnpike road, over and above the current expenses attending the same; and this capital shall be estimated and settled in the following manner, that is to say: the value of the real estate of the grantee or grantees, required for the works authorized by his, her or their charter, shall be fixed by the act granting or authorizing the charter, and when this is not done, the said estate shall be regarded as of no value. To this sum thus fixed by act, shall be added all the expenses of the construction of the said work, and the extinguishment of the title to lands of other persons required therefor. And a commission constituted as hereinafter expressed, shall examine the accounts and vouchers of such expenses, as soon as the said works are completed; and the said commission, or a majority of them, shall thereupon declare the amount thus vouched, together with the sum fixed, as the value of the real estate of the grantee or grantees, to be the capital of the said charter; and when any addition or extension of the said work shall thereafter be made, a further account thereof shall be taken, examined and vouched, as aforesaid, and added to the said capital. The profits shall be estimated in the following manner, that is to say: wherever the proprietor or proprietors shall be required so to do, by a resolution or Act of the Legislature, by the Governor of the State, or by any other person or persons, duly appointed or authorized by the Legislature for that purpose, he, she, or they, shall keep for the year, beginning on the first day of January following, a correct account of all the tolls or ferriages, by him, her or them, or any other person received on account of the said work, specifying the receipts of each day, and the description of travelling, on which the same may have been paid; and also shall keep a correct account of all expenses, by him, her or them,

Not more than double interest.

Commission to examine accounts.

incurred, in keeping and repairing the said work, during the said year; and the said accounts shall be submitted to the commission aforesaid, who, after the same shall have been by them examined, vouched and approved, shall report the whole amount of receipts and expenditures, approved by them to the next Legislature, together with the items of accounts shewing the same. Where the commissioners are not satisfied with the accounts of one year, they may continue it, not exceeding three years, and report the result of each year to the Legislature in manner aforesaid. And thereupon, the surplus of actual profits, beyond the profits limited by this act, may be, by the Legislature, ordered to be applied to the extinguishment of the said capital.

Amount of capital to be entered in a book.

It shall be the duty of the proprietor, or proprietors of every bridge, ferry, or turnpike road, to cause to be entered in a book, to be kept by the treasurer of the upper division, the amount of his, her or their capital, and every enlargement or extinguishment thereof, within three months after the same shall have been settled and established.—Ib., sec. 5, 308.

How to proceed where any loss shall be sustained.

When any loss shall be sustained at any bridge, ferry, or turnpike road, for which suit shall be brought and tried, and a recovery had against the proprietor or proprietors, and the jury shall find that the loss was occasioned without any actual negligence on his, her, or their part; or the attorney general or solicitor of the circuit shall certify, that he had notice to attend the said trial, and that there was no proof of actual negligence; the amount of the said recovery and costs may be charged as a part of the current expenses of the year in which the loss happened; and as such, shall be admitted by the commission above mentioned.—Ib., sec. 6.

Bridges may be insured.

The proprietor, or proprietors of a chartered bridge, shall be authorized to have the same insured against all risks, and the premium paid on such insurance shall be charged in the current expenses of the year in which it is paid, and as such, shall be admitted by the commissioners; *provided*, such premium shall not exceed three per cent. on the cost of the bridge ascertained as aforesaid.—Ib. sec. 7.

Insurance may be effected against losses at ferries.

The proprietor, or proprietors of any chartered ferry, may effect insurances against all losses that may take place at the said ferry, and which he or they may be liable to pay; and the premium paid on such insurance shall be charged in the current expenses of the year in which it is paid, and as such, shall be admitted by the commissioners; or in case no such insurance shall be effected, the proprietor or proprietors may charge to the said current expenses in each year, a

not exceeding six per cent. on the capital invested in the said
—*Ib.*, sec. 8th.

The rate of tolls receivable at any bridge or turnpike gate, shall be Rates of toll.
tolls, unless otherwise expressed in the act, granting or author-
ing the charter.

every carriage with four wheels, for the conveyance of persons, (except stage coaches, running regularly on the road,) drawn by four horses or mules, -	\$1 00
drawn by three horses or mules, - - - - -	75
“ two “ “ - - - - -	50
every other carriage, with four wheels, drawn by six horses, oxen, or mules, or more, - - - - -	75
drawn by four horses, oxen, or mules, or more, - - - - -	62½
drawn by three “ “ “ “ - - - - -	50
drawn by two “ “ “ “ - - - - -	37½
every carriage with two wheels, for the conveyance of persons, drawn by two horses or mules, or more, -	50
every carriage, other than for the conveyance of persons, drawn by four horses or mules, - - - - -	50
drawn by three horses or mules, - - - - -	37½
every other carriage, - - - - -	25
“ person on horseback, or leading or driving a horse or mule, - - - - -	12½
“ led horse or mule, accompanying a person on horse- back, - - - - -	6½
“ horse or mule in drove, - - - - -	4
“ head of cattle, - - - - -	3
“ hog, sheep, or goat, - - - - -	2
“ animal for show, in addition to the carriage in which it may be conveyed, - - - - -	50
“ foot passenger crossing a bridge, - - - - -	6½

But no foot passenger shall be liable to pay toll for passing a turn-
pike gate.—*Ib.*, p. 309, sec. 9.

The rate of all toll or ferriage, expressed in any charter, or in this
shall be the maximum of toll to be received, but may be dimin- ^{Toll may be diminished.}
ished by the proprietor or proprietors, at pleasure, or by the Legis-
lature; when there shall have been in the year or years in which the
account was taken, a surplus of actual profit beyond the profit
authorized by this act; *Provided*, that such diminution by the Legisla-
ture shall not exceed the rate of such surplus, nor shall any diminution,
authorized by the Legislature, continue beyond the year in which the

next account of profits shall be rendered to the Legislature in manner aforesaid, on such requisitions as aforesaid, or at the request of the proprietor or proprietors.—Ib., sec. 10.

Tolls to be paid before passing the gate.

The tolls demandable and payable at the toll gate of any bridge or turnpike road, now constructed or hereafter to be constructed by the authority of the Legislature, shall be paid, if required, before passing the gate, in the bills of the Bank of the State of South-Carolina, or some other incorporated Bank of this State, which redeems its bills in specie whenever presented, or in gold, silver, or copper coins of the United States, or in such foreign coins as are made by law, current in this State. The collectors at the gate or ferry shall make change of all such coins or bills offered him in payment of tolls, under the value of five dollars, except six-and-a-quarter and five cent bills, or coins which shall always be paid to the collector, where a less sum is due to him for tolls, unless the exact change shall be tendered him in the copper coin of the United States.—Ib., sec. 11.

Warrant may be issued to collect tolls.

In case the toll is not paid before passing the gate of any turnpike road, bridge, or ferry, and shall be refused or neglected to be paid, immediately after, the collector may issue his distress warrant for the same, and cause it to be levied on the carriage, horse, animal or other thing, which has incurred the demand for toll, or any article or thing conveyed in such carriage, or on such horse, animal or thing; and the things so distrained shall be disposed of in the same manner as goods distrained for rent arrear, are or may be disposed of.—Ib., sec. 12.

Persons exempt from toll.

Exemption from the payment of toll, at every bridge, ferry and turnpike road, hereafter chartered, shall be granted to every regularly ordained or licensed minister of the gospel; to every member of the Legislature, going to or from its sittings, and all other persons going to and returning from divine service, and to every person travelling, in the performance of any civil or military duty, for which he receives no salary or reward; and to every person, whose duty it may be made, by law, to examine the said work, with not more than one servant, a carriage, and two horses; and that all other exemptions heretofore granted, be repealed. In time of war or insurrection, troops, with their baggage, artillery, and munitions of war, exclusively in the service of this State, shall pass every bridge, ferry, and turnpike road, at one half of the established toll or ferriage.—Ib., sec. 13.

4th. Fines and Penalties, and how Recovered.

Penalty for taking more toll than legal.

Any ferryman, person or persons, owning or keeping any bridge or ferry, who shall receive greater toll or ferriage than is allowed by

law, shall forfeit and pay the sum of five dollars, to be recovered before any justice of the peace, one half of which shall go to the informer, and the other half to the use of the poor of the parish, in which such sum is recovered. 9th S. L., 478.

By Act of 1823, 9th S. L., 528; If the owners, keepers, or proprietors ^{Penalty on certain ferries.} of any of the ferries or bridges, established by this act, shall insist on, or compel, by threats, or other means, or receive payment of toll or ferriage from any person exempt by law from the payment of the same, or a greater sum than is allowed by law, such person or persons, guilty of such exaction or reception, shall be subject and liable to a forfeiture of ten dollars, for the use of the person or persons illegally paying the same, to be recovered by warrant under the hand and seal of any justice of the peace or quorum in this State, living in the district adjoining the said ferry. The ferries subject to this clause are, Lewis's, on Tiger River; Guignard's Bridge, on South Edisto; Gowers's Ferry, on Combahee; Mickles' Ferry, over Wateree; Gambrill's Bridge, on Saluda; Kingsbury's Ferry, on Catawba; and Puckett's Ferry, on Saluda.

Every person keeping a ferry shall employ a free white man constantly to attend to the same, and on failure thereof, shall forfeit for ^{For not employing a white man.} every month of neglect, to provide such person, four pounds proclamation money, (according to Brevard, equal to £3; equal to \$13 32 cents,) for the use of such person or persons as shall prosecute for the same, to be recovered on conviction, on the oath of one or more credible witnesses, before any one justice of the peace, by warrant of distress and sale of the offenders' goods. 3d S. L., 626.

And if he shall transport, or suffer to be transported, across such ferry, any servant not having a note or certificate, under the hand and seal of a justice, he shall forfeit the same amount, to be recovered to the use of the owner of such servant, four pounds proclamation money.—Ibid. ^{Passing servant without note.}

If any person or persons shall meet with unnecessary delay at any public ferry, bridge, or causeway, established by law, every such person shall recover from the persons keeping such ferry, bridge, or causeway, for every hour of such unnecessary delay, the sum of forty shillings, to be recovered on application from the party aggrieved, by warrant and execution, from any neighbouring magistrate. 9th S. L., 312. ^{Penalty for delay.}

Every ferry owner and keeper, shall provide and keep attached to each end of his ferry flat or flats, a good and sufficient apron, or not having such apron, shall keep at each and every landing place, a good

and sufficient abutment or inclined plane for the same; and for default, shall be fined in a sum not exceeding ten dollars for every three days continuance of such default, to be recovered in any Court having competent jurisdiction of the same; one half to the informer, the other half to the State.—Ibid, 544.

Not keeping
up rates.

If any owner or keeper of a ferry, bridge, or causeway, shall neglect or refuse to keep fixed up their several rates, as established by law, they shall forfeit all such toll as they would be entitled to receive.—Ibid, 396.

For not
keeping
banks in
order.

It shall be the duty of every person keeping a ferry, to keep in good order the banks of the river or creek at such ferry; and in case of neglect, shall be subject to a fine of three dollars, for each and every day of such neglect, the same to be recovered before any magistrate having competent jurisdiction.—Ibid, 443.

Persons
within one
mile of ferry
may not
transport.

If any person living within one mile of any established ferry, shall for any fee, toll, or reward whatever, transport any person, goods, or cattle, from one side only to the other of that river, where any such established ferry shall be kept, in every such case, he shall forfeit and pay to the owner of the ferry next adjacent the place where such fare was taken up, treble the value of the fee, toll, or reward, given, paid, or promised; to be recovered before a magistrate, according to the act for the trial of small and mean causes, any law, usage, or custom, to the contrary notwithstanding. But if a passenger be delayed more than half an hour, at any such ferry, then any person living near, may transport them. Ibid, 123.

Penalty on
injuring
bridge.

If any person or persons shall wantonly or wilfully injure or destroy any bridge or causeway, now or to be established by law, every such person, on indictment and conviction of the same, at the Court of General Sessions, in the district where the offence was committed, shall be subject to such fine and imprisonment as either the said Courts shall direct.—Ibid, 311.

Penalty for
the driving
other than
on the right
of centre.

Any person who shall lead, drive, or having charge thereof, shall permit any carriage, animal, or other thing, to travel over any turnpike road, causey, or bridge, other than on the right of the centre thereof, shall, on conviction thereof, before any Court of competent jurisdiction, pay a fine not exceeding ten, nor less than two dollars, and be further liable for the damage occasioned thereby. 6th S. L., 314.

Or faster
than a walk.

The same penalty is affixed to the offence of crossing such bridge more than ten feet long, in a gait faster than a walk. Ibid,

for person shall carry over, or otherwise have or place any fire on ^{No fire to be carried on} wooden bridge, or bridge, the superstruction whereof is of wood, ^{bridge.} constructed by the authority of the legislature; and for conviction shall as above.—Ibid.

F I N E S .

The sheriff of each district, and every justice of the peace and clerk of any Court, after receiving any fine or forfeiture, shall, as soon as may be, pay the same into the public treasury, excepting such fines and forfeitures, as may be appropriated to the use of such district: and if any sheriff, or his deputy, or any clerk of a Court, shall keep in his hands any monies, which shall be paid to him for any fine or forfeiture, for any space of time more than two calendar months after such monies shall have been delivered to him, he shall forfeit triple the amount of the sum so detained; and every sheriff, justice, and clerk of a Court, shall cause to be kept a just and regular entry of all fines and forfeitures, that shall come into their hands, respectively; and if any fraud, or wilful failure, shall be committed by any sheriff, deputy sheriff, justice, clerk of a Court, or constable, in levying, paying, or accounting for, any fine, or forfeiture, and he be thereof convicted, the offender shall forfeit triple the sum, whereof there shall be committed, fraud, or failure, and be thereafter incapable to hold his office: provided, that all forfeited recognizances, and fines imposed for trespass or misdemeanor, or for default of jurors, shall be subject to the payment of twelve dollars and eighty-five cents, for every session sermon that shall be preached at any district Court. 1787, P. L., 420.

All fines, penalties and forfeitures, recovered in any Court of justice in this State, and not appropriated by Act of Assembly, shall be paid into the public treasury. 1769, P. L., p. 272.

It shall be the duty of the several clerks of the Courts in this State, to collect and receive all fines inflicted, and forfeitures incurred in their respective Courts, and to pay the same over to the treasurer of the division, in which they reside, respectively, on, or before, the first day of October in every year; and to render an account thereof to the comptroller-general, as heretofore required by law. 1820, Sess. Acts, p. 12.

It shall be the duty of the attorney-general, and each of the solicitors of the different circuits, to certify to the comptroller-general, on, or before, the first Monday in October in every year, the fines and forfeitures which have been had or inflicted by the Courts on his circuit, within the year next preceding the day aforesaid; and it shall be the duty of each of the clerks of the several circuit Court districts, to return to the comptroller-general, on, or before, the first day of October in every year, an account, upon oath, of all the fines and forfeitures inflicted, had, or received, within his district, and of the manner how appropriated, or remitted: and in case of failure of any clerk, to render such account, he shall forfeit and pay the sum of two hundred dollars, to be recovered in any Court having jurisdiction: and it shall be the duty of the comptroller-general, to direct the attorney-general, or solicitors, as the case may be, to sue for and recover the said sum of such clerk, as shall fail to render such account: and should the said attorney-general, or solicitors, not perform the duty hereby required, they shall be subject to the penalty of one hundred dollars, to be recovered in any Court having competent jurisdiction. 1810, Sess. Acts, p. 16.

In every case where any recognizance shall be adjudged forfeited, or where any fine shall be imposed by, or recovered for the use of the State in any district Court, or before a justice of the peace, if the party incurring such fine or forfeiture shall fail to pay down the same, with the costs of prosecution, a writ, in nature of a writ of *fiery facias*, shall issue, by virtue of which the sheriff or his deputy shall sell (in the same manner as property is sold under execution in civil cases,) so much of such offender's estate, real, or personal, as may be necessary to satisfy the fine, or forfeiture, and also the costs of prosecution, and also the reasonable charges of taking, keeping and selling such property; returning the overplus, if any, to the offender, together with a bill of the fine or forfeiture, with costs and charges, if he require it: but the sheriff shall sell every other part of the personal estate, before he shall sell any negro. And if the sheriff, or his deputy, return, on oath, that such offender refused to pay, or hath not any property, or not sufficient whereon to levy, then a writ of *capias ad satisfaciendum* shall issue, whereby he shall be committed to the common jail, until the forfeiture, costs and charges, be satisfied; entitled however to the privilege of insolvent debtors. 1787, P. L., p. 420.

FIRE ARMS.

[See ARMS.]

FIRE HUNTING.

By Act of 1789, 5th S. L., 124 ; That any person, or persons, who shall hunt with fire in the night time, for every such offence shall forfeit and pay a sum not exceeding two pounds, and for every deer so killed, a sum not exceeding five pounds; and for every horse or head of neat cattle, or other stock of any kind, a sum not exceeding ten pounds, which penalties shall and may be recovered before any one justice of the peace, and four disinterested freeholders, in the parish or county where the offence shall be committed; and when recovered, shall be paid one half to the use of the parish, and the other half to the use of the informer, who shall sue for and recover the same; and in default of paying such fine, the justice may commit the offender, without bail or mainprize, to the common jail of the district, for a term not exceeding three months.

Penalty on persons who hunt with fire in night time.

In addition to the above penalties, such person is liable to an action at law by the person aggrieved by the killing of horse or other stock.—Ib.

Also liable to action.

In case any slave be detected in fire hunting, or shall kill in the night time, any deer, horse or neat cattle, or stock of any kind, not the property of his master or owner, such slave shall, on conviction thereof before any one justice, and four (by Act of 1839, five) freeholders of the county or district where the offence was committed, receive such corporal punishment, not extending to life or limb, nor exceeding thirty-nine lashes, as the said justice and freeholders shall direct; or in case it shall appear upon evidence to the satisfaction of the Court, that the said offence was committed with the privity or consent of the owner or overseer of said slave, such owner or overseer shall be liable to the penalty, to be recovered and applied as prescribed by this act, where he commits the offence personally.—Ib.

Punishment of slave for.

It shall and may be lawful for any justice of the peace, before whom information may be lodged for any breach of this ordinance, to issue his warrant to any lawful constable, commanding him to summon a sufficient number of disinterested freeholders, to appear at a time and place certain, for the purpose of hearing and trying, and

Justice to summon freeholders.

determining on the said information; and the freeholders so summoned are required to attend, on pain of forfeiting the sum of ten shillings each, to be levied and applied as hereinbefore mentioned, by authority of the same justice, unless such defaulter give good and sufficient cause, on oath, to the satisfaction of the said justice.—Ib.

Oath of
freeholders.

The justice shall administer to the freeholders, before their entrance on trial, the following oath :

“I, A. B., do swear (or affirm) that I will, to the best of judgement, without partiality, favour or affection, try the cause pending between A., plaintiff, and B., defendant, and true verdict according to the evidence : So help me God.”—Ib.

FISH, AND FISHERIES.

Penalty for
poisoning
creek.

If any white person, by any means, shall poison any creek in this province, he or they, upon proof made thereof before any justice of the peace, shall forfeit ten pounds current money; (equal to \$6 98) and in case any slave shall be proved guilty of the same, by the sentence of any other slave, before any justice of the peace, (and by the Act of 1839, five freeholders), the Court is empowered to order said slave, so convicted, to be publicly whipped, not exceeding thirteen lashes.

- 1st. LIST OF RIVERS AND CREEKS REQUIRED TO BE KEPT OPEN FOR THE PASSAGE OF FISH, AND THE WIDTH OF PASSAGE.
- 2d. COMMISSIONERS OF CERTAIN RIVERS, AND THEIR DUTY.
- 3d. PENALTIES, AND REMOVAL OF OBSTRUCTIONS.

1st. *Creeks and Rivers to be kept open.*

List of Names.	Width of Passage.	Vol.
Broad River, - - - - -	60 feet.	6th S. L.
Catawba River, - - - - -	60 “	“
Chinquapin creek, up to Horsepen branch, - - - - -	6 “	5th “
Enoree River, to Gun's Mill, - - - - -	20 “	6th “
Keowee River, - - - - -	60 “	5th “
Little River, or Deep creek, - - - - -	10 “	5th “
Lynch's Creek, Big, - - - - -	8 “	5th “
Lynch's Creek, Little, half of the width of Creek, - - - - -		6th “
Pacolet to Easterwood's shoals, - - - - -	60 “	6th “
Saluda River, - - - - -	60 “	5th “
Stephens' Creek, - - - - -	sufficient.	7th “
Thompson's Creek, - - - - -	6 feet	5th “
Tyger River, - - - - -	sufficient.	7th “
Wateree River, - - - - -	60 feet.	6th “
Reedy River, - - - - -	10 “	5th “

2d. Commissioners, and their Duty.

For each of the rivers or sections, hereafter named, there shall be appointed a Board of Five Commissioners, by a joint resolution of both branches of the Legislature, who shall serve three years, from the date of their appointment, and for neglecting to serve, shall be subject to pay a fine of twenty dollars, to be recovered before any Court of competent jurisdiction, to be paid into the public treasury.

Commissioners to be appointed.

One Board for Saluda River, from its junction with the Congaree to the Newberry Line, to be called the Saluda Board of Fish Sluices.

Board of Commissioners.

One Board for Broad River, including the Congaree, above Granby, to the Newberry Line, called the Broad River Board of Fish Sluices.

Another for Broad River, commencing at the Newberry Line, and extending to the Ninety-nine Islands, called the Upper Broad River Board.

One for Pacolet, commencing at the mouth, and extending to Easterwood's Shoals, called the Pacolet River Board.

One Board for the Wateree and Catawba Rivers; (by Act of 1838, 6th S. L., 598, to consist of nine persons, four of whom to reside below Pickett's Mills) from the foot of Graves' Shoals to the mouth of Fishing Creek; and one Board from the mouth of Fishing Creek to the North-Carolina Line; to be called the Catawba Board of Fish Sluices.

It shall be the duty of said Boards, on their respective rivers, to designate the fish sluices thereof, so as to leave one or more passages for fish up the said rivers; which sluices shall be sixty feet wide, or where there are two or more such sluices, they shall be together sixty feet wide; and when they shall be so designated, it shall be lawful for any person to open such sluices. But the said Boards have no authority to designate any fish sluice through any dam erected by public authority for the improvement of the navigation, or through any dam erected by individuals for the purpose of propelling machinery, where the owner of said dam shall leave open a part of the river, sixty feet wide, or shall construct in the dam, a sufficient fish sluice, sixty feet wide, and shall keep open the same during the months of February, March, and April. 6th S. L., 341.

Duty of said Boards.

Not to open sluice through dam.

The Catawba Board shall designate fish sluices but once a year, and whenever changed, in any year, it shall be done on or before the first day of October.—Ibid, 599.

3d. Penalties, and removal of Obstructions.

Every owner of a fish dam, mill dam, hedge or other obstruction on

Lynch's
Creek.

Big Lynch's Creek, is required, at all times, from the 15th day of February to the first day of April, to provide and keep open a passage for fish, at least eight feet wide, or a canal of the same width, and of sufficient depth; and for every day's neglect thereof, shall forfeit and pay six pounds, lawful money of this State, to be recovered in any Court of competent jurisdiction, by any person who shall inform and sue for the same, one moiety to the use of the county, and the other to the prosecutor. 5th S. L., 218.

Chinquapi
and Thompson's
Creek.

The owners of dams or obstructions, except mill dams, on Chinquapi Creek, are required to keep open a passage six feet wide, and for default, shall forfeit and pay to any person who shall inform and sue for the same, five dollars for every week of neglect; and on Thompson's Creek, for every day's neglect to provide such passage, the forfeit is five dollars. 5th S. L., 279.

Penalty for
obstructing
Keowee
River.

Any persons who now have, or hereafter shall erect any fish dams or mill dams, obstruction or flutter wheel, or contrivance, artifice, or machinery in the Keowee, which is intended, or has a tendency to prevent the free passage of fish, shall forfeit and pay to any person who shall inform and sue for the same, the sum of ten dollars for every six hours during which such obstruction shall continue.

Mill dams or fish dams may, however, be erected on said river, if the boat sluice and thirty feet on each side, or sixty feet on the dam side, where the sluice runs near the bank, be left open.

Deep Creek,
Twelve Mile,
and Little
Rivers.

Any person who shall erect an obstruction across the waters of Deep Creek, or the rivers Twelve Mile, or Little River, and shall not leave a passage at least ten feet wide, shall forfeit and pay to any person who shall inform and sue for the same, before any justice of the peace, ten dollars for every twenty-four hours during which such obstruction shall continue.

The aforesaid obstruction, &c., shall be considered nuisance, and may be abated as such, by any person or persons whomsoever 5th S. L., 647.

Penalty for
obstructing
Reedy River.

Any person having a dam or obstruction across Reedy River, from its mouth to the Tumbling Shoals, shall, at all times, between the 15th of February and the first day of May, keep a passage at least ten feet wide, sufficient to let the fish pass freely, and for every twenty-four hours neglect to do so, shall forfeit and pay to the use of the informer six dollars, to be recovered before any justice of the peace of the district.

Lynch's
Creek.

And the owners of dams or obstructions of Little Lynch Creek shall leave open one half the width of the creek; and for every six

days neglect to do so, shall severally forfeit and pay twenty dollars, to be recovered before any one justice, one half to the informer, the other half to the use of the poor of the district; and any three of the inhabitants of the district are authorized to remove such obstruction. 5th S. L., 700

If any person shall obstruct a sluice, opened by the Board of Commissioners for Saluda, Broad, Pacolet, Wateree, and Catawba Rivers, such obstruction may be abated as a nuisance, and the party erecting the same, on conviction, shall be fined in a sum not exceeding twenty nor less than five dollars, before any Court having competent jurisdiction, and if said fine be not paid, shall stand committed, not exceeding ten days, one half the fine to the informer, the other to the treasury of the State. Penalty for obstructing fish sluices.

No person shall erect a trap or device, for catching fish, or fish with any net or seine, within eighty yards of any dam, erected at the expense of the State, across any stream intended thereby to be made navigable, in which dams there be a sluice for the passage of fish, on pain of being liable to pay twelve dollars for each offence, to be recovered before the Court of Sessions of the district, one half to the informer, and the other to the support of the work, to which the dam is attached; and such trap or other device may be abated as a nuisance. 5th S. L., 340. No trap or fishing within eighty yards of dams.

If the fine be not paid, the party may be committed to close custody, not exceeding ten days.

If any person shall erect a dam, trap, or other device, for fishing between the Broad River Dams, and fifty yards below the Islands, with which said dams are connected, and between the Islands, or the islands and main lands, he shall be fined for every such offence, twelve dollars, to be recovered before any justice of the peace of Richland or Lexington districts, one half to the informer, and the other to the funds of the Columbia Canal, and such trap or device may be abated as a common nuisance. 6th S. L., 372. No trap in Broad River, near dams.

Any person who shall be convicted, by indictment, in the Court of Sessions, of obstructing fish sluices in any of the rivers of this State, shall pay a fine of one hundred dollars. 6th S. L., 569. Fine if convicted by indictment.

Any person who shall take and carry away from any fish trap, any fish, being in said trap, with intent to defraud and deprive the owner, owners of said trap, of said fish, shall be deemed guilty of a misdemeanor, and on conviction thereof, by indictment, shall be punished by a fine, not exceeding two hundred dollars, and imprisonment, not exceeding six months. Stealing from a trap.

Obstructing
navigation.

Any person who shall place, or cause to be placed, any trap, near any boat sluice, in any river, so as to injure the free navigation of said river, shall forfeit for each offence, one hundred dollars, to be recovered by indictment. 6th S. L., 393.

FORCIBLE ENTRY AND DETAINER.

1st. WHAT IS A FORCIBLE ENTRY.

2d. WHAT IS A FORCIBLE DETAINER.

3d. HOW PUNISHABLE AT THE GENERAL SESSIONS.

4th. PROCEEDINGS FOR RESTITUTION.

5th. PRECEDENTS.

1st. *What is a Forcible Entry.*

A forcible entry is where an entry is made into lands, tenements, benefices of holy Church or other possessions, where no entry is given by law, or where an entry be lawful, and the party enters with strong hand, with unusual weapons or an unusual number of servants, or multitude of people.

Of entry by
violence or
threats.

An entry may be forcible, not only in respect of violence done to the person of a man, but also in respect of any other kind of violence, in the manner of entry. As by breaking open the doors of a house, whether any person be in it or not; and though a man enter peaceably, yet, if he turn the party in possession out by violence or threats, this also amounts to a forcible entry, but not if he merely threaten to spoil the party's goods, or destroy his cattle, or do any injury which is not of a personal nature.

Also, conti-
nuing in
possession.

Also, persons continuing in possession of a defeasible estate after the title is defeated, are punishable for a forcible entry; for continuing in possession afterwards, amounts in law to a new entry. 1 Tomlins, 810.

May be of a
rent.

This offence may be committed of a rent as well as of a house and land, as where one comes to distrain, and the tenant by force or threats, makes resistance. 2 Shep., 201.

Not of an
easement.

But forcible entry cannot be of an easement, or of a common, or office.

Not of one's
own house.

So no man can be guilty of a forcible entry for entering into lands or houses in his own sole possession at the time of entry; as by breaking open doors of his house, detained from him by one who has the

bare custody; but joint tenants, or tenants in common, may be guilty of forcible entry in holding out their companions. 1 Haw., P. C.

If an entry be surreptitiously obtained, yet if it be continued by force, it will be regarded as forcible, and whenever an unlawful entry of one, necessarily dispossess the other, it will be a forcible entry. ^{Surreptitiously.} State vs. Burt., 2 Tread, 489.

A forcible entry may be committed by a single person, as well as by twenty, and all who accompany one when he makes a forcible entry, shall be adjudged to enter with him, whether they come upon the lands or not. And an infant or *feme covert* may be guilty of this offence, in respect of violence committed by them in person, but not for what is done by others at their command, their commands being void. ^{Who may commit.} 1 Tomlins, 810.

2d. What is a Forcible Detainer.

A forcible detainer is where a man, who enters forcibly or peaceably, though unlawfully, afterwards retains possession by force or threats, and the detainer may be forcible, whether the entry be forcible or not. 1 Haw., P. C., c. 64.

If a person, after peaceable entry, shall make use of arms to defend his possession, it will be a forcible detainer.

If I hear that persons will come to my house to beat me, and I take in force to defend myself, this is not a forcible detainer; but where they are coming to take lawful possession, it is otherwise.

If a man have two houses next adjoining, the one by a defeasible title, and the other by a good title, and he uses force in that he hath by the good title, to keep persons out of the other house, this is a forcible detainer. ^{If one house be used, to detain another.} 2 Shep. Ab., 203.

When a tenant keeps possession of the land at the end of his term against his landlord, it is a forcible detainer. ^{Tenant holding over.} And if a lessee takes a new lease of another person whom he conceives to have a better title, and at the end of his term keeps possession against his landlord, it is a forcible detainer. Cro. Jac., 199.

If a justice of the peace come to view a force in a house, and they refuse to let him in, this of itself will make a forcible detainer in all cases, but it must be upon complaint made. ^{Refusal to admit a justice.} Dalt., 312.

But a person is not guilty of a forcible detainer by merely refusing to go out of a house, and continuing therein in despite of another. 1 Haw., c. 64.

If A. be tenant at will of B., and B. enters and commands A. to ^{Tenant at will.}

quit possession, and he denies it, this is no forcible detainer, unless some act of violence be used. 1 Shaw's Justice, 453.

3d. How punishable at the General Sessions.

By indictment.

The party grieved may be aided and have the assistance of the justices at the general sessions, by way of indictment; which being found there, he shall be restored to his possession, by a writ of restitution, granted out of the same Court to the sheriff. Dalt., c. 129.

No restitution is to be made where there is no forcible putting out, or holding out of possession, and found by a jury. 1 Shaw's Just., 444.

Place described.

And the tenement in which the force was made, must be described with convenient certainty; and must set forth that the defendant actually entered, and ousted the party grieved, and continueth his possession at the time of finding the indictment; otherwise he cannot have restitution, because it doth not appear that he needeth it. 1 Haw., 147, 149, 150.

Expulsion and disseisin must be expressly alleged in inquisitions and indictments on forcible entries; but tenants at will are not within the statutes. Popham, 205; F. N. B., 248; Sid., 102; 1 Mod., 73; 2 Keble, 709, Holme's case.

Tenant at will hath no certain indefeasible estate, nothing that can be assigned by him to any other, because the lessor may determine his will and put him out whenever he pleases: for the lessee only holds at the will of the lessor. 2 Black. Com., 145.

If a man's wife, children, or servants, do continue in the house, or upon the land, he is not ousted of his possession; but his cattle being upon the ground, do not preserve his possession. Dalt., c. 132.

An indictment for forcible entry was quashed for not setting forth, that the party was seized or disseized, or what estate he had in the tenement; for if he had only a term for years, then the entry must be laid, into the freehold of A. in the possession of B. 3 Salk., 169.

If the statutes are mis-recited in the indictment, it will be quashed. Croke, Eliz. 93, 96, 106, 107, 697; 1 Bulstrode, 218.

The indictment was for a forcible entry into a copy-hold, viz: that the defendant *ejecit et disseisivit*, for which reason it was quashed; because disseisin is applicable only to freehold, and therefore in all cases, except for a freehold, it ought to be *ejecit, expulit et amovit*. Raym., 67; 4 Inst., 176.

If a forcible entry and detainer shall be made by three persons or

is also a riot, and may be proceeded against as such, if no oath before been made of the force. Dalt., c. 44.

4th. Of proceedings for Restitution.

one has been forcibly ousted of an estate for years, or a state, restitution may be had, either by indictment in the in which case a writ of restitution is awarded, on conviction, operation thereof is not suspended by appeal, (Bennet adds the Rice's Dig., 340,) or by inquisition before two magistrates. power of one justice to make restitution under the English ^{of the} made of force, is taken away by the Act of 1829, 6th S. L., ^{inquisition.} which provides, "That the forms and proceedings before magistrates of forcible entry and detainer, shall hereafter be the are prescribed by law in cases where tenants hold over after ation of their leases;" and by the Acts of 1817, 6th S. L., p. f 1839, p. 21, such cases are to be tried before the magistrates, re freeholders.

two magistrates of the district are authorized and required, ^{Drawing the} complaint made, to place the names of twenty-four neighbouring ^{jury, and} ^{time of trial.} in a box, and from them draw the names of eighteen, and reupon issue their warrant in the nature of a summons, to the sheriff or constable of the district, commanding such ^{summon the said eighteen freeholders, (better summon the} ^{jur,}) to attend at a certain time within four days, and at a pointed; and from the said eighteen freeholders so summoned, shall be drawn in the same manner, who shall be empaneled ^{facts.} ^{Provided, that if, from the number of eighteen so} ^{ad,} the number of twelve cannot from any cause be had, the ^{tes} are authorized to complete the number from the remain- nally selected. Acts of 1839, p. 21.

eeholders shall be liable to the same objections by either ^{Freeholders} ^{may be} ^{objected to,} ^{and fined for} ^{non-atten-} ^{dance.} jurymen are, and shall be liable to the same fine for non- ce, without sufficient cause, as jurymen are for non-attendance ^{urts.} The said fine to be imposed by the Court of Common the district at its next session thereafter; and it shall be the re justices to return the names of those freeholders who shall x to attend, into the office of the clerk of the said Court, who y commanded to proceed against the defaulters, as against idant jurymen. 6th S. L., 67.

aid magistrates shall also summon the party charged, in the y, and at the same time, to appear before them and shew

Shall summon the party charged, and determine.

cause, if any, why possession of the premises should not forthwith be restored to the complainant; and if upon hearing the case, they shall be satisfied that he is entitled to the possession of the premises in question, they shall so find, whereof the said magistrates shall make a record, and shall thereupon issue their warrant, directed to the sheriff of the district, commanding him forthwith to deliver to the complainant, his heirs or assigns, full possession of the premises, and to levy all expenses incurred, of the goods and chattels of the defendant. Acts of 1839, p. 21.

Sheriff to execute warrant in ten days.

The sheriff shall execute the said warrant in ten days, and to that end may break open doors if he be resisted, and may call to his aid the *posse comitatus*; and for neglect or refusal to perform any of the duties required, he shall, in addition to an action for damages, forfeit and pay the sum of five hundred dollars, to be recovered by the party aggrieved, in an action of debt. 6th S. L., 68.

St. Philip's and St. Michael's.

The proceedings in forcible entry and detainer, in the parishes of St. Philip's and St. Michael's, vary from the above, in that, one ministerial magistrate prepares the case for trial, summons the parties, presents the case for docketing, and conducts the trial as prosecuting officer. The freeholders also are drawn by him, in the presence of a judicial magistrate, from a box kept by the judicial magistrates. 6th S. L., 486.

5th. *Precedents.*

1st. *A Record of a Forcible Detainer.*

District. } ss.

Be it remembered, that on the day of in the year
at in the district aforesaid, A. C. complained to me, I. P., one
of the justices assigned to keep the peace in the said district, that E.
E., of into the messuage of him, the said A. C., being the
mansion-house of him, the said A. C., situated within the district
aforesaid, did enter, and him, the said A. C., of the messuage afore-
said, unlawfully ejected, expelled and amoved, and the said messuage
from him, the said A. C., unlawfully, with strong hand, and armed
power, doth yet hold, and from him detain, against the form of the
statute in such case made and provided; whereupon the said A. C.
then, to wit, on the day of aforesaid, required and prayed
of me the remedy provided by the statute, which complaint and prayer
by me being heard, I personally went to the said messuage, and did
then and there find and see the aforesaid E. E., the aforesaid mes-

age, with force and arms unlawfully, with strong hand and armed power detaining, against the form of the statute in such case made and provided; whereupon the said E. E. was arrested, and sent to the common jail of Charleston, by virtue of a *mittimus* duly issued by me for that purpose, concerning which the premises aforesaid, I do make this my record. In witness whereof, I do hereunto set my hand and seal, the day of , in the year .

2d. Mittimus for a Forcible Detainer.

District. } ss.

By I. P., one of the justices of the peace, for the district aforesaid.

To the keeper of the common jail of .

Whereas upon complaint made unto me, by A. C. of , in the id parish, I did this present day, go to the dwelling house of the said C. aforesaid, and there did find E. E., of , forcibly, with strong hand, and armed power, holding the said house against the peace of this State, and against the form of the statutes in that behalf made and provided: therefore I send you by the bringers hereof, the body of the said E. E.; convicted of the said forcible holding, by my own view, testimony and record, commanding you to receive him into our said jail, and there safely to keep him till he shall be thence delivered in due course of law. Herein fail not at your peril. Given, &c.

3d. Affidavit.

STATE OF SOUTH-CAROLINA, }
District. }

Personally appeared before me, A. B., magistrate for the district of State aforesaid, C. D., and made oath, that he was in quiet and peaceable possession of a dwelling house, (or field, or other possession) situate, (describe its situation as correctly as possible,) which deponent held as tenant unto E. F., for a term of years, (or in his own right, if here set forth what estate,) yet unexpired, and that on the of D. B., and (here insert all who were present, aiding and abetting,) did with force, threats, and violence, enter and take possession of the said premises, and by force have ever since kept, and will keep possession of the same; (if they have departed, then state the forcible entry, or if the entry be peaceable, and the parties

LAW OF MAGISTRATES.

detain by force, set forth the facts as they exist, as indictment will lie for either a forcible entry or detainer.

Sworn to before me this }
day of 18 }

A. B., Magistrate.

(Signed,)

C. D.

4th. Warrant of Arrest.

STATE OF SOUTH-CAROLINA, }
District. }

By A. B., magistrate, in and for the said State.

To any lawful Constable.

Whereas complaint on oath has been made unto me that (here set forth the facts, as in the affidavit.)

These are therefore to command you to apprehend the said D. B., &c., and bring them before me, to be dealt with according to law.

Given under my hand and seal, at , this day of ,
A. D. one thousand eight hundred and .

A. B. [L. s.]
Magistrate.

If the affidavit set forth a case requiring restitution, then the magistrate shall call to his aid another, and they two shall issue their joint warrant.

5th. Warrant of two Magistrates for Freeholders.

STATE OF SOUTH-CAROLINA, }
District. }

By A. B. and C. B., magistrates, in and for the said State.

To any lawful Constable, (or to B. A., sheriff of the said district.)

You are hereby commanded to summon the freeholders, whose names are in the pannel hereto annexed, to be and appear before us, at , on the day of , (within four days) at o'clock, to inquire upon their oaths of and concerning a certain entry and detainer, forcibly done in a certain (house or other possession,) situated on , in the peaceable and quiet possession of C. D., against the form of the statute, &c. And you are further commanded to summon D. B., &c., who are charged with such forcible entry and detainer, to be and appear before us, at the same time and place, to shew cause, if any, why restitution of the said premises should not

Given under our hands and seals, this day of A. D., 184
A. B., [L. s.]
Magistrate.
C. B. [L. s.]
Magistrate.

TO THE FOREMAN.

TO THE OTHERS OF THE JURY.

7th. The Inquisition or finding of the Jury.

We find that C. D. was lawfully and peaceably possessed of a certain (here insert the premises, whether house, field, or other possession,) situated in the district aforesaid, (here describe the situation as correctly as possible, by naming the neighbourhood, between what two neighbours, on or near what road, and on which side, if in a town or village, set forth the street and number, &c.), of an estate (here set forth what estate the prosecutor has, whether an estate for a year or years, or for life, or in fee simple.)

That on the day of , instant, (here name the parties who took possession,) with strong hand, and with force and arms, entered into the said premises, and expelled, ejected and removed the said C. D. thereof, and him so expelled, ejected, and removed of the said premises, until the day of the taking of this inquisition, and the

LAW OF MAGISTRATES.

same, with main force and power withheld, and now do withhold, against the form of the statute, in such cases made and provided, and against the peace and dignity of the said State.

(This Inquisition must be signed by all the freeholders.)

8th. *Writ of Restitution.*

STATE OF SOUTH-CAROLINA, }
District. }

To E. G., sheriff of the said District.

Whereas, by an Inquisition had at _____, in the State aforesaid, on the _____ day of _____ instant, by the oaths of (here insert the names of the freeholders,) good and lawful men of the said district and State, before us, _____, two of the magistrates, in and for the said district and State, it was found by the said freeholders, that C. D. was lawfully and peaceably in possession of a certain _____, situated in the district aforesaid (describe particularly the situation) of an estate (set forth the estate, according to the finding,) and that A. B., &c., did forcibly enter the said premises, and dispossess the said C. D., and doth still forcibly detain the same. These are, therefore, to command you, forthwith, to eject the said A. B., &c., from the said premises, and to deliver to the said C. D., his heirs or assigns, full possession of the same. You are also commanded, that of the goods and chattels of the said A. B., &c., you levy the sum of _____ dollars, for the expenses incurred in the said proceedings; and of your manner of executing this warrant, you shall make return to us within ten days from this date. Herein fail not under the penalties that will fall therein. Given under our hands and seals, this _____ day of _____ A. D., one thousand eight hundred and _____.

A. B. [L. s.]
Magistrate.

C. B. [L. s.]
Magistrate.

FORESTALLING, ENGROSSING, AND REGRATING,

Are offences generally classed together, as of the same nature, and equally hurtful to the public. The English statute against these offences have been repealed, the remedy having been found worse than the disease, and the Act of 1739, of this State, was permitted to expire, so that they remain as offences, only indictable at Common Law.

Forestalling is the buying, or bargaining for any corn, cattle, or other merchandize by the way, as they come to the fairs or markets, to be sold, before they are brought thither to the intent to sell them again at a higher or dearer price. Definition.

Engrossing is the getting into one's possession, or the buying up all of any commodity in market, with intent to sell it at an unreasonable price, and is an indictable offence, and fineable at common law. Engrossing.

Regrating is the buying of corn or other dead victual in any market, and selling it again in the same market. Regrating.

The proceedings against a party for either of the above offences, should set forth the article bought, and the quantity. Tomlins, 831.

F O R G E R Y .

Forgery, at common law, may be defined to be the fraudulent making or alteration of a writing to the prejudice of another man's right, for which the offender may suffer fine, imprisonment, and pillory. Besides the offence at common law, which is of the degree only of a misdemeanor, there are many kinds of forgery, not only by making, but by using and uttering of which, the party is subjected to punishment by various statutes of this State, and by Acts of Congress. Until the Act of 1845, many kinds of forgery were punishable with death without benefit of clergy; but by Act of 1845, p. 341, it is enacted, that those cases of forgery, which before that time were punishable with death, shall be punishable with whipping, not exceeding thirty-nine lashes, imprisonment not less than one, nor more than seven years, and fine at the discretion of the judge who may try the case. Definition.
Act of 1845.

1st. OF THE WRITTEN INSTRUMENT, WITH RESPECT TO WHICH FORGERY MAY BE COMMITTED.

2d. OF THE MAKING, OR ALTERATION, OR UTTERING OF SUCH INSTRUMENT.

3d. OF THE INTENT TO DEFRAUD.

4th. OF THE PUNISHMENT UNDER THE VARIOUS STATUTES AND ACTS OF CONGRESS.

5th. REQUISITES OF THE AFFIDAVIT, &c.

1st. Of the Written Instrument, at Common Law.

It is clearly agreed, that at common law, the counterfeiting of a matter of record is forgery; for since the law gives the highest credit Records.

to all records, it cannot but be of the utmost ill consequence to the public, to have them either forged or falsified.

Or matter of public nature.

Also, it is agreed to be forgery to counterfeit any authentic matter of a public nature.

Or deed, or will.

It is also unquestionable, that a man may be in like manner guilty of forgery at common law, by forging a deed, or will. And though much doubt has been thrown upon the question, whether the counterfeiting of private writings, not under seal, be forgery at common law, yet it is now considered as settled law, that forgery may be committed of any writing, which, if genuine, would operate as the foundation of another's liability. 2 Russel, 350 and 51, n.

Private writings not under seal.

By Act of Assembly.

By Acts of Assembly, 2d S. L., 489, 3d S. L., 470, and 5th S. L., 397, the following instruments are enumerated: the falsely making, or causing to be made, or the uttering and publishing of which, knowing them to be falsely made, is forgery: nameiy, any deed, charter, or writing sealed, Court roll, or will of any person in writing, whereby another's freehold may be troubled, or whereby a lease or annuity may be claimed.

Instruments the subject of forgery, under the statutes.

Any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for the payment of money or the delivery of goods, bank notes for the payment of money, or any indorsement or assignment of such bill of exchange, promissory and bank note, or any acquittance or receipt, either of money or goods, or any acceptance of any bill of exchange, or the number or principal sum of any promissory note or bank note, or the number or principal sum of any accountable receipt for any note, bill, or other security for payment of money, or any warrant or order for the payment of money, or delivery of goods.

Records of the State.

To falsely make, alter, change, deface or erase, or cause, or procure to be so done, any of the records of this State, or any plat or plats of land, annexed or referred to in any grants, or which are lodged, entered, or enrolled in any record office in this State, is forgery also. It is forgery to counterfeit any pedlar's licence, or travel with such counterfeit licence, or with one granted to any other person.

By Acts of Congress.

The written instruments which may be the subject of forgery under the Acts of Congress, are judgements, certificates, or other public security; 1 S. L. U. S., 86. Any deed, power of attorney, order,

certificate, receipt, or other writing, for the purpose of obtaining from the United States, or any of their officers or agents, any sum of money; 3d S. L. U. S., 1917. Any paper, writing, or instrument, in imitation of, or purporting to be an indent, certificate of the public stock, or debt, treasury note, or other public security of the United States, or any letters patent of the United States, or any bill, check or draft, for money drawn by, or on any treasurer or other officer, or agent of the United States; or any paper, writing or instrument, purporting to be, or in imitation of any letter of attorney or other authority, to assign or sell any share in the public stock or debt of the United States; or any instrument in imitation of, or purporting to be an official copy of the enrolment of any vessel, or a licence to any vessel, or a certificate of ownership, passport, sea letter or clearance, or a permit, debenture, or other official document, granted by a collector, or other officer of the customs, by virtue of his or their office; 3d S. L. U. S., 2003; certificates of citizenship, 2 S. L. U. S., 304; and consular certificates, 3d S. L. U. S., 1889.

Instruments the subject of forgery, under the Acts of Congress.

2d. *Of the Making, Alteration, &c.*

The making, with a fraudulent intent, and without lawful authority, of any instrument, which, at common law or any statute, is the subject of forgery, is of itself a sufficient completion of the offence before publication; and though publication be the medium by which the intent is usually made manifest, yet it may be proved as plainly by other evidence. 2 East. P. C., p. 855.

Making sufficient without publication.

Not only the false making of the whole of a written instrument, but a fraudulent insertion, alteration, or erasure even of a letter in any material part of a true instrument, whereby a new operation is given to it, will amount to forgery; and this, though it be afterwards executed by another person ignorant of the deceit. And the fraudulent application of a true signature to a false instrument, for which it was not intended, or *vice versa*, will also be forgery. Thus, it is forgery in a man, who is ordered to draw a will for a sick person, insert in it legacies of his own head, or to write a release over a name at the bottom of a letter. 2 Russel, 319.

Alteration.

A man may be guilty of forgery by making a false deed in his own name. Thus, if he make a deed of lands to one person, and afterwards make a deed of the same lands to another, and antedate the second deed, it is forgery.—Ibid, 320.

Making a false deed in a man's own name.

If a bill, or note, payable to A. B., or order, get into the hands of a person of the same name as the payee, and such person knowing

Endorsing
or uttering
by a party of
the same
name.

that he is not the payee in whose favour it was drawn, endorse it for the purpose of possessing himself of the money, he is guilty of forgery. So is the uttering a note as the note of another, by a person of the same name. *Ibid*, 321.

Using a fictitious name.

It is settled, that the making of a deed, power of attorney, or other instrument, which is the subject of forgery, in the name of a fictitious person, with a fraudulent intent, is forgery. 2 Russel, 328.

And it is immaterial whether any additional credit be gained by using the false name; for in Shephard's case, 2 East. P. C., 967, who drew a draft on a banker in a fictitious name, assumed by him for the purpose of fraud, and to avoid detection, it was held to be forgery, although the credit was given to him personally.

Not necessary that the instrument should be valid.

It is in no way material whether a forged instrument be made in such a manner, as that if it were genuine it would be of validity or not, yet it seems that the false instrument should carry on its face some semblance of that for which it is counterfeited, and should not be illegal in its very frame.—2d Russ., 345.

A mere literal mistake, as in the name of the party, or leaving out the christian name, or using a wrong one, or the omission of endorsement of the payee, will make no difference; but it will be forgery to falsely make a bill without the name of a payee.—*Ibid*, 344.

Not complete.

So it will not be forgery to make and utter a note, which, for want of a signature, is incomplete, or to falsely make a will attested by only ten witnesses. 2 East. P. C., 954.

But if the instrument falsely made, be only not available by reason of some collateral objection, it is forgery. 2 East. P. C., 852.

3d. Of the Intent to Defraud.

Need be no actual injury.

The intention to deceive and defraud, constitutes the chief ingredients of this offence of forgery; yet it is immaterial whether any person be actually defrauded, provided that he may have been prejudiced by the act done. 1 Haw. P. C., c. 70, s. 11.

General intent sufficient.

But although to constitute forgery there must be an intent to defraud, still there need not be an intent to defraud any particular person, but a general intent to defraud is sufficient; and if a person do an act, the probable consequence of which is to defraud, it will, in contemplation of law, constitute a fraudulent intent. 2 Russel, 353.

Writing another's name by command.

The intention to defraud being necessary to constitute forgery, he is not guilty of this offence, who writes another man's name to a deed in his presence, and by his command.—*Ibid*, 355.

4th. Punishment.

By Act of 1845, p. 341, in cases where the punishment of forgery, ^{whipping, fine, and imprisonment.} or of counterfeiting, was death without benefit of clergy, the said punishment is abolished, and in lieu thereof, the party convicted is subject to a whipping of thirty-nine lashes, and to imprisonment of not less than one or more than seven years, and to a fine at the discretion of the judge who may try the case. This punishment is therefore to be inflicted in cases of forgery, under the statutes of this State, except the forgery of a pedlar's licence, in which case the punishment is a forfeiture of £400, current money, equal, (according to James,) to \$240, and such other pains and penalties as may be inflicted for forgery at common law.

The following is a table of the punishments affixed by act of Congress to various kinds of forgery.

Offence.

The forging of any record or proceeding in any Court of the United States,

Of any certificate of citizenship,

Of any deed, power of attorney, &c., for receiving money from the United States,

Of any treasury note or other public security of the United States, or any letter of attorney, or authority, to convey any share in the public stock,

Of an abstract or official copy, or certificate of registry of a vessel, or a licence for coasting, or fishing, or any official document granted by a collector,

Punishment.

Fine not exceeding five thousand dollars, imprisonment not exceeding seven years, and whipping, not exceeding thirty-nine stripes.

Imprisonment, not less than three nor more than five years, and fine not less than five hundred, or more than a thousand dollars.

Imprisonment and hard labour, not less than one or more than ten years; or imprisonment, not exceeding five years, and fine, not exceeding one thousand dollars.

The party deemed guilty of felony, and subject to fine, not exceeding five thousand dollars, and to imprisonment and confinement, to hard labour, not exceeding ten years.

By fine, not exceeding one thousand dollars, and imprisonment and confinement to hard labour, not exceeding three years.

Offence.

Of a consular certificate,

Punishment.

Adjudged guilty of felony, and fined not exceeding ten thousand dollars, and imprisoned for a term not exceeding three years.

5th. Requisites of the Affidavit, &c.

AFFIDAVIT.

The affidavit should contain the names of all the parties, in full, viz: the name of the person forging, altering, or uttering, of the person whose name is forged, and of the person to whom the forged instrument was offered or given, the time and place of the forgery, or uttering, and a copy of the instrument forged or uttered.

WARRANT.

The warrant does not differ from the precedents, given in other cases before treated of. It should recite so much of the affidavit as is necessary to shew the offence.

RECOGNIZANCE.

The recognizance must not be in a less sum than the heaviest amount of fine for the offence charged. Its condition must require the party charged to appear at the Court of General Sessions of the district, where the offence is said to have been committed, except in cases of offence against an act of Congress, in which case, it should require his appearance at the Circuit or District Court of the United States.

FREE PERSONS OF COLOUR.

- 1st. OF THEIR RIGHTS, PRIVILEGES, AND HOW THEY MAY SUE.
- 2d. OF THEIR DISABILITIES, SUBJECTION, AND DUTIES REQUIRED OF THEM.
- 3d. OF OFFENCES, AND THEIR TRIAL. [See also, SLAVES.]
- 4th. PENALTY ON PERSONS OBSTRUCTING THE LAW IN RELATION TO.
- 5th. PRECEDENTS.

1st. Of their Rights, &c.

All negroes, mulattoes, and mestizoes, except such as were free at the passage of the act of 1740, are by that act declared to be and remain forever absolute slaves. Yet, those who have since acquired

freedom, though they are classed with and subject to the same mode of trial as slaves are, still differ from them in many respects.

They are entitled to their liberty, a special mode of trial being provided, in case of an attempt to reduce them to slavery; and by Act of Assembly, 6th S. L., 574, any person guilty of forcibly taking one from the State, with intent to deprive him or her of liberty, is subject to a fine of one thousand dollars, and imprisonment for twelve months; and such person actually selling such free person of colour, is subject to receive, in addition to such fine and imprisonment, thirty-nine lashes on the bare back. Entitled to liberty.

And by Act of 1820, 7th S. L., 460, a person bringing into this State a free person of colour, and holding the same as a slave, or selling, or offering to sell the same, as a slave, is liable to a penalty of one thousand dollars, over and above the damages which such free person may recover.

They are capable of contracting among themselves and with white persons, though their contracts cannot be enforced at law, unless made in the presence of a white person, since a free person of colour will in no case be a competent witness. May contract.

They may acquire title to property by descent or by purchase, and may alien or transmit the same to their heirs; and in this respect their condition seems to be superior to an alien, for an alien, though he may acquire title to land, by purchase, yet, he cannot, by descent, nor can he transmit the same to his heirs: yet, a free person of colour, though he can never become a citizen, may yet hold land to himself and his heirs forever. Acquire property.

They may sue and be sued in the usual form, in all cases except where their right to freedom is in issue, in which case, by Act of Assembly of 1740, 7th S. L., 398, the action is by guardian, in the nature of ravishment of ward, and the defendant may be required, pending the action, to enter into recognizance with one or more sufficient sureties, in such sum as the Court of Common Pleas may direct, conditioned that he shall produce the said ward, and not eloin, misuse, or abuse him or her, during the continuance of the suit.

2d. Of their Disabilities, Subjection, &c.

Every free male negro, mulatto, or mestizo, above the age of fifteen years, is compelled to have a guardian, who is a respectable freeholder of the district where such free person resides. The said guardian is required to go before the clerk of the Court of the district, and signify his acceptance of the trust in writing, and also give to the Must have a guardian.

said clerk his certificate, that the said free person is of good character and correct habits; which acceptance and certificate, the clerk is required to record, and for the same is entitled to a fee of fifty cents; and if any such free person is unable to conform to the above requisitions, such person shall be dealt with as a person of colour, coming into the State contrary to law. 7th S. L., 462.

Not a
competent
witness.

They are not competent witnesses, in any case, in a Court of Record, even if both parties to the suit be of the same class with them; nor can book entries, made by a free negro, be received in evidence on the oath of a white person, to their hand writing. *Groning vs. Devana*; 2 Bail., 192.

May take
prison
bounds oath.

But they may take the oath required by the prison bounds act, in order to obtain his discharge. *Glenn vs. Lopez*, Har., 105.

May be sold
for tax.

They are subject to a capitation tax, and by the various acts enacted from year to year, and finally enacted generally by Act 1843, page 246, the tax collector is authorized to issue his execution against all such free negroes, mulattoes, or mestizoes, as shall neglect or refuse to pay the tax imposed by law, directed to the sheriff of this State, requiring them to sell for a term, not exceeding one year, the services of such persons, to meet the payment of the tax imposed. But the sheriff is not authorized to sell for a term longer than is necessary, to pay the taxes and costs.

Liable to
fatigue
duty.

By Act of 1841, page 200, each commander of a division, brigade, regiment, squadron, battalion, or beat company, shall respectively, have power to order out all male free negroes, moors, mulattoes, and mestizoes, between the ages of eighteen and forty-five years, residing within the limits of their respective commands, to perform such labour as fatigue men, as shall be deemed necessary for military purposes; and if any, so summoned, shall fail to obey such officer, or shall refuse to perform the work required of him, he shall be fined two dollars and fifty per cent. on his last general tax, for each day he shall fail to attend, or refuse to do such work; but no one shall be compelled to perform more than ten days fatigue work in one year.

May not be
employed as
clerk.

By Act of 1834, page 469, any person who shall employ as a clerk, or salesman, in or about any store, shop, or house, used for trading, any slave, or free person of color, he shall be liable to be indicted therefor, and upon conviction, shall be fined for each offence, not exceeding one hundred dollars, and to be imprisoned, not exceeding six months.

3d. Of their Offences, Trial, &c.

Entering, or returning, after having left the State.

by Act of 1835, 7 S. L., 470, all free negroes, or free persons of color, are forbidden to enter the State by land or water, or to return after having left the State; and in case any free negro or person of color (not being employed on board a vessel) enter the State contrary to law, any white person may seize and convey him or her before any magistrate of the district or parish, who is authorized to commit him to bail such person, and to summon three (by Act of 1839, § 5) freeholders, and form a Court, as for the trial of free persons of color, within six days after his or her arrest; and if such person be convicted of entering the State, or of returning after having left, the said magistrate shall order him or her to leave the State, and to commit to prison him or her, until such time as he or she can leave, or the magistrate may take bail for the departure of such free person within fifteen days.

Mode of trial, &c.

Every free person of color so bailed and ordered to leave the State, shall not leave within the time prescribed, or who, having left the State after conviction as aforesaid, shall return into the same, shall be arrested and committed to close prison, and upon proof before a Court, constituted as aforesaid, of his or her having failed to leave the State, or of having returned after leaving, he or she shall be subjected to such corporal punishment as the said Court shall see fit to inflict.—Ib.

Penalty for not leaving.

And if, after such punishment, such free person of color shall still remain in the State longer than the time allowed, or shall return after leaving, such person, on conviction before a Court, constituted as aforesaid, shall be sold at public sale as a slave, one half the proceeds to the State, the other to the informer.—Ib.

Penalty for returning after punishment as slave.

If any free person of color shall enter this State in employment on board a vessel, from any other State or foreign port, the sheriff of the district, where such vessel arrives, is required to apprehend such person of color, and confine him or her closely in a jail, until the vessel is ready to proceed to sea; then the captain of the said vessel is bound to carry away such free person of color, and pay the expenses of his or her detention. And the sheriff, on apprehending such free persons of color, shall compel the captain to enter into recognizance with good and sufficient security, in the sum of one thousand dollars for each free person of color in his employ; conditioned, that he will comply with the foregoing requisitions; and in case of his neglect, refusal or inability to do the same, he shall be compelled by the sheriff to haul his vessel into the stream, one hundred yards from the shore, and remain until said vessel shall proceed

Entering in the employ of any vessel.

to sea. And if he shall not haul off his vessel within twenty-four hours after said order, he shall be indicted therefor, and on conviction, forfeit and pay one thousand dollars, and suffer imprisonment not exceeding six months.—Ib.

By Act of 1844, p. 293, free persons of color arrested by the sheriff under the above act, are deprived of the benefit of *habeas corpus*, and in case the sheriff shall be unable to enforce the above act by means of the *posse comitatus*, and the civil authorities usually at his command, he is authorized to call upon the Governor, who is required to order out a sufficient number of the militia of this State, and place them under discreet officers, with orders to assist the sheriff.

To be
warned by a
justice.

It shall be the duty of the sheriff, during the confinement of such free person of color, to call upon some justice of the peace or quorum, to warn such free person never to enter the State after departing therefrom; and the said justice shall insert the name of such free person in a book, provided by the sheriff, and shall therein specify his or her age, occupation, and distinguishing marks; which book shall be evidence of such warning. And said book shall be a public record, and open to the examination of all persons, and shall be deposited in the office of the clerk of general sessions. And for his services, the justice shall receive from the captain of the vessel two dollars; and every person so warned, who shall not depart from the State, or having departed shall return, shall be dealt with as is directed, with regard to persons of color who shall migrate into this State. 7 S. L. 471.

Exceptions.

All free negroes arriving in this State by shipwreck or stress of weather, or employed in any vessel of the United States, or other power in amity with the United States, are exempt from the operation of this act. But in case of shipwreck, they may be arrested and confined, and required to leave the State within thirty days after such shipwreck. And in the latter case, they are liable to the operation of the act, if found on shore after being warned by the sheriff, or his deputy, to keep on board their vessels.—Ib., 473.

No limita-
tion.

By Act of 1823, 7th S. L., 465, prosecutions for the before-mentioned offences may be maintained without limitation of time.

2d. Circulating Seditious Papers.

If any free person of color shall be convicted of having directly or indirectly circulated, or brought within this State, any written or printed paper, with intent to disturb the peace or security of the same, in relation to the slaves thereof, he or she shall, for the first offence, be sentenced to pay a fine not exceeding one thousand dollars, and for

second offence, shall be whipped not exceeding fifty lashes, and be banished from the State; and if he or she return from such banishment, without unavoidable accident, he or she shall suffer death, without benefit of clergy. 7th S. L., 460.

By Act of 1835, 7th S. L., 474, no free negro, or other free person of color, shall carry any fire-arms, or other military or dangerous weapons, abroad, except with a written ticket from his or their guardian, under the pain of forfeiting the same, and being fined or whipped at the discretion of any magistrate, and three (by Act of 1839, five) holders, before whom he or they may be convicted thereof.

4th. Penalty on persons obstructing, etc.

Any person or persons, who shall on his, her, or their own behalf, under color, or in virtue of any commission or authority from any State, or public authority of any State in this Union, or of any foreign power, come within the limits of this State, for the purpose, or with intent to disturb, counteract or hinder the operation of such laws and regulations as have been, or shall be made by the public authorities of this State, in relation to slaves or free persons of color, such person or persons shall be deemed guilty of a high misdemeanor, and shall be committed for trial to the common jail of the district, by any one of the judges of the Courts of law or equity, or the recorder of the city of Charleston, unless admitted to bail by the said judge or recorder; and upon conviction thereof by any Court of competent jurisdiction, shall be sentenced to banishment from the State, and to such fine and imprisonment as may be deemed fitting by the Court which shall have tried such offence. Acts 1839, p. 292.

Any person within this State, who shall at any time accept any commission or authority from any State, or public authority of any State in this Union, or from any foreign power, in relation to slaves or free persons of color, and who shall commit any overt act, with intent to disturb the peace or security of this State, or with intent to disturb, counteract, or hinder the operation of the laws or regulations of the public authorities of this State, made; or to be made, in relation to slaves or free persons of color, such person shall be deemed guilty of a misdemeanor, and upon due conviction thereof before any competent Court, shall be sentenced to pay, for the first offence, a fine not exceeding one thousand dollars, and to be imprisoned not exceeding one year; and for the second offence, he shall be imprisoned for ten years, and pay a fine of not less than one thousand dollars, or be banished from the State, as the Court shall see fit.—Ib.

Governor to
require for-
eign offen-
ders to leave
the State.

The Governor, for the time being, shall require any person or persons, who shall or may have come within the limits of this State, on his, her, or their own behalf, or under color, or in virtue of any commission or authority from any State, or public authority of any State in this Union, or from any foreign power, having relation to the laws or regulations of this State, on the subject of slaves or free persons of color, to depart from the limits of this State within forty-eight hours after such notice, and such person shall thereupon be bound to depart; and in case of his neglect or refusal so to depart, as aforesaid, the said person shall be deemed guilty of a high misdemeanor, and shall be committed by the same authority herein before stated, for trial, to the common jail of the district, unless admitted to bail as herein before stated; and upon due conviction before any Court of competent jurisdiction, shall be sentenced to be banished from the State, and to such fine and imprisonment as the Court shall think expedient.—Ib.

Penalty for
second
offence.

Any person, who shall be convicted a second, or any subsequent time, under the provisions of the first or third sections of this Act, shall be imprisoned for a term not less than seven years, and shall pay a fine of not less than one thousand dollars, and shall, in addition thereto, be banished from the State.—Ib.

Duty of the
sheriff.

It shall be the duty of the sheriff of the district to see that any sentence of banishment be duly executed, and that the offender be sent without the limits of the State; and in case any person so banished shall return within this State, (unless by unavoidable accident,) the sheriff of the district, when he may be found, shall hold him in close confinement under the original sentence, until such offender shall enter into recognizance before the clerk of the Court, with sufficient sureties, to comply with the terms of the said sentence, and forever to remain without the limits of this State.—Ib.

5th Precedents.

Recognizance of Free Persons entering the State.

STATE OF SOUTH-CAROLINA.

Be it remembered, that on the day of in the year of our Lord one thousand eight hundred and , personally appeared A. B., a free person of color, and C. D., before me, magistrate, in and for the said State, who acknowledged themselves indebted to the State of South-Carolina, that is to say, the said A. B., in the sum of dollars, and the said C. D. in the sum of dollars, like money,

be levied of their separate lands and tenements, goods and chattels, respectively, to and for the use of the said State, if the above named A. B. shall fail in the performing the condition underwritten.

The condition of this recognizance is such, that if the said A. B., who has entered the State contrary to law, shall depart from and without the limits of the State, within fifteen days from the date thereof, and in the mean time do keep the peace of the State, and be of good behaviour towards all the citizens thereof, then this recognizance to be null and void, or else to remain in full force and virtue.

Taken and acknowledged the day and }
year above written, before me, }

E. F.,

Magistrate.

A. B. [L. s.]

C. D. [L. s.]

Recognizance of Captain or Commander.

Commencement as in the preceding. Penalty, one thousand dollars for each free person of color.)

The condition of this recognizance is such, that if the said A. B., Captain of , who has brought into this State C. D., a free person of color, shall, on the sailing of the said vessel, carry away from and beyond the limits of this State, the said C. D., and shall pay the expenses of the arrest and detention of the said C. D., then this recognizance to be null and void, or else to remain in full force and virtue.

Taken and acknowledged before me, }
the year and day above written. }

E. F.,

Magistrate.

A. B. [L. s.]

Surety, [L. s.]

FRUIT TREES.

By statute 37, H. 8, c. 6, 2d S. L., 478; If any person or persons maliciously, willingly, or unlawfully, bark any apple trees, pear trees, or other fruit trees, of any other person or persons, every such offender and offenders shall not only lose and forfeit to the party grieved, treble damages for such offence or offences, the same to be recovered by action of trespass, at the common law, but also shall lose and forfeit ^{Penalty for injuring.}

to the State, for every such offence, ten pounds sterling, in the name of a fine.

FUGITIVES FROM JUSTICE.

Must be
surrendered
on demand.

By the Constitution of the United States, Act 4th, sec. 2d, a person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

May be
arrested
before
demand.

In the case of the State vs. Anderson, 1 Hill, 327, it was held, that a person charged with treason, felony, or other crime, in one State, and fleeing to another, may, *before demand made* on the Governor, be arrested in the State in which he is found, for the purpose of being surrendered to the State from which he fled, either by warrant from a magistrate, or by private persons without a warrant; and such persons may justify the arrest, by shewing that the prisoner has committed, or stands charged with a felony, or other crime, in another State; and the same rule applies to fugitives from a foreign nation.

Doubtful in
misdemeanors.

In the case of Miller vs. Grice, 2 Richardson, 27, the judge below decides that this right to arrest does not extend to cases of misdemeanor, but the Court above neither sustains nor overrules the point.

G A M I N G .

[See LOTTERIES.]

The statutes against gaming, which are of force in this State, are 16th Ch. 2, c. 7; 2 S. L., 517; 9th Anne, c. 14; 2 S. L., 565; Act of 1791, 5th S. L., 178; Act of 1802, 5th S. L., 432; the Act of 1815, 6th S. L., p. 27; and a special Act relating to Columbia, 6th S. L., 553. The enactments whereof may be considered under the following heads.

1st. OF WHAT WAGERS ARE VOID.

2d. BY WHOM, AND HOW MONEY WON AT GAMING MAY BE RECOVERED BACK.

3d. OF THE VARIOUS OFFENCES UNDER THESE STATUTES, AND THEIR PUNISHMENT.

4th. OF THE POWERS OF A MAGISTRATE FOR THE PREVENTION OF GAMING.

5th. PRECEDENTS.

1st. Of Void Wagers.

By statute 16th Ch. 2, c. 6; If any person or persons play at any game or games whatever, and shall bet on the side or hands of such as do play, and shall lose any money or thing, exceeding the sum of one hundred pounds upon ticket, credit, or otherwise, and shall not pay down at the time, the party that so loseth shall not be compelled to pay or make good the same; but the contracts, judgements, statutes, recognizances, mortgages, conveyances, assurances, bonds, bills, specialties, promises, covenants, agreements, and other acts, deeds, and securities, whatsoever, which shall be entered into for the same or any part thereof, shall be utterly void, and of none effect.

The statute 9 Anne, c. 14, 2 S. L., 565; Without limit as to amount, makes void, all notes, bills, bonds, judgements, mortgages, or other securities or conveyances, whatsoever, where the whole or part of the consideration of the same is for money, or other valuable thing, won by playing at cards, dice, or other game, whatsoever, or by betting on the hands of such as do game, or for money knowingly lent for such secret gaming, or at the time and place of such play, to any person so gaming. But, inasmuch as this statute does not also make void, "all contracts, promises, and agreements," as does the statute of 16 Ch., it hath been doubted whether a sum less than the one hundred pounds, won at such game, may not be recovered on a parol contract, or promise to pay. But in the case of *Corley vs. Berry*, 1 Bail., 593, it was settled that by the spirit of the statute, all contracts upon a wager, above ten pounds, were void, inasmuch as such wager, if paid, might, under the statute, be recovered back; and in the same case, it was held, that a wager on a horse race, was included in the terms, "any game or games, whatsoever."

All notes,
&c., void.

The statute of 1791, re-enacts the statute of 9th Anne, and includes by name, cock-fighting and horse racing.

2d. When, and by whom money won, may be recovered back.

By statute, 9th Anne, c. 14, 2d S. L., 465; Any person who shall, at any time, or sitting, by playing at cards, dice, table, or other game or games, whatsoever, or by betting on the hands of such as do play,

lose to any one or more persons, in the whole, the sum of ten pounds, and shall pay or deliver the same, or any part thereof, the person so losing, shall be at liberty, within three months, to sue for and recover the same from the winner; and if the loser does not sue within the time aforesaid, and with effect prosecute for the money, or other thing, by him so lost, then it shall be lawful for any person to sue for and recover the same, and treble the value thereof, one moiety to the person who shall sue, and the other to the poor of the parish.

3d. Of the various Offences under these Statutes, and their Punishment.

If any person shall, by any fraud or shift, cousenage, circumvention, deceit or unlawful device, or ill practice whatsoever, in playing at cards, dice, table, or other game whatsoever, or by bearing a part in the stakes, wagers or adventures, or in betting on the hands of such as do play, win, obtain, or acquire to themselves, or to any others, any sum of money or other valuable thing whatsoever, and being convicted thereof, upon indictment, or information, he shall forfeit five times the value of the sum of money, or other thing, so won as aforesaid, and shall be deemed infamous, and suffer such corporal punishment as in cases of wilful perjury. Any person winning more than ten pounds at a sitting, is subject to the same penalty, except the corporal punishment. 2d S. L, 567.

Playing at
any tavern,
&c.

If any person shall play at any tavern, inn, or store, for the retailing of spirituous liquors, or in any house, used as a place for gaming, or in any barn, kitchen, stable, or other out house, or in any street, high-way, or in any open wood, high-way, race-field, or open place, at any game, or games, with cards, or dice, or any gaming table, commonly called A. B. C., or F. O., or distinguished by any other letters or figures, or roley poley table, or at *rouge* and *noir*, or at any *faro* bank, or at any other table, or bank of the like kind, under any denomination whatever, (except the games of billiards, bowls, backgammon, chess, draughts, or whist, when there is no betting,) or shall bet on the sides of such as do game, upon being convicted by indictment, shall be imprisoned, not exceeding twelve months, and forfeit a sum not exceeding five hundred dollars, one half to the use of the informer, the other to the State.

The keeper
of such
tavern
chargeable.

Every person keeping such tavern, inn, retail store, or public place, or house, used as a place for gaming, or such other public house, shall, upon conviction, be imprisoned not exceeding twelve months, and forfeit a sum not exceeding two thousand dollars for each and

every offence, one half to the use of the informer, the other half to the State. 6th S. L., 27.

Any person who shall set up, keep, or use any gaming table, commonly called A. B. C., or E. O., or known or distinguished by any other letters or figures, or roley poley table, or table to play at *rouge and noir*, or any faro bank, or any other gaming table or bank for the purpose of gaming, (except billiards, bowls, chess, draughts and backgammon) upon being convicted thereof, upon indictment, shall forfeit a sum not exceeding five hundred, nor less than two hundred dollars.—Ib.

Penalty for keeping gaming table.

Upon conviction of any person, by virtue of this act, the Court before whom such conviction shall take place, is hereby required to commit such offender to the common jail for a period not exceeding twelve months, unless the fine imposed and costs be sooner paid.—Ib.

Offender may be committed until penalty is paid.

28.

No corporation or persons, having power to grant licenses for the retailing of spirituous liquors, shall grant such license to any person convicted of any of the offences created by this act; and such license is hereby declared null and void, and shall not be received in evidence upon an indictment for retailing spirituous liquors without a license.—Ib.

License to be withheld.

All and every sum of money staked, betted, or pending on the event of any such games, is hereby declared to be forfeited, one half to the State, and the other half to the informer, or person seizing the same.—Ib.

Money staked, forfeited.

All persons who might be subjected to the penalties imposed by this act, either for gaming or keeping a gaming table, shall, upon being permitted by the attorney, or any solicitor, to become evidence in behalf of the State, be freed from the same, and be entitled to one half of the fines recovered upon his information.—Ib.

Informer exonerated.

If any person shall, within ten miles of South-Carolina College, keep, or assist in keeping, any house for gaming, or any faro bank, or other device for gaming, he shall be proceeded against as a vagrant, and upon conviction, shall enter into recognizance to the State in the sum of two thousand dollars, with two good and sufficient sureties, (who shall be freeholders) in the sum of one thousand dollars each, to be taken and approved before the clerk of the Court of Richland district; conditioned, not to offend against the provisions of this act for the space of three years, or in default thereof shall forthwith be committed to the jail of the district, to be dealt with as a vagrant; and for every offence, after having given such bond on conviction, he shall be fined not exceeding one thousand dollars, and be imprisoned not exceeding twelve months. 6th S. L., 555.

Penalty for keeping a gaming house near South-Carolina College.

How offender may be prosecuted.

Any magistrate is hereby required, upon the written requisitions of the faculty of South-Carolina College, through their presiding officer, or of the solicitor of the circuit, suggesting the name of any offender against the provisions of this act, and any witnesses, necessary to the investigation, forthwith to issue warrants, to bring before him such offender and witnesses; and if, upon investigation before such magistrate, he be satisfied that further proceedings are warranted, a Court shall be organized, as in other cases, for the trial of vagrants, before which such offender shall be tried and dealt with as hereinbefore directed.—Ib.

4th. Of the power of a Magistrate to suppress Gaming.

Two magistrates to cause those who seem to live by gaming, to find sureties for good behaviour.

Any two or more magistrates may cause to come, or be brought before them, every such person, within their respective limits, whom they may have just cause to suspect to have no visible estate, profession or calling, to maintain themselves by, but do, for the most part, support themselves by gaming; and if such persons do not make it appear to such magistrates, that the principal part of his or their expenses is not maintained by gaming, that then such magistrates shall require of him or them sufficient sureties for his or their good behaviour, for the space of twelve months; and in default of his or their finding such securities, to commit him or them to the common jail, there to remain until he or they shall find such securities as aforesaid.

Playing for more than twenty shillings, a breach of bond.

And if such person so finding securities as aforesaid, shall, during the time for which he or they shall be so bound to their good behaviour, at any one time or sitting, play or bet for any sum of money or other thing, exceeding in the whole the value of twenty shillings, that then such playing shall be deemed or taken to be a breach of his or their behaviour, and a forfeiture of the recognizance given for the same. 2 S. L., 567.

Magistrate authorized to seize and burn gaming tables.

It shall and may be lawful for any magistrate, by warrant under his hand, to order to be seized, and publicly burnt or destroyed, any of the gaming tables, commonly called A. B. C., or E. O., or any other table distinguished and known by any other letters, or by any figures, or any other gaming tables of the same or like kind, under any other denomination whatsoever; and the keeper thereof shall be deemed and treated as vagrants. 5th S. L., 433.

Keepers deemed vagrants.

Suspected houses may be forcibly entered.

Any State magistrate, on information by oath of any credible witness, of gaming being carried on, or a gaming table kept in any house, is authorized to grant his warrant, under hand and seal, to break

open and enter any closed doors or rooms, wherever the said offences are alleged to prevail. 6th S. L., 28.

For power of Magistrates under the College Act, see SUPRA.

5th. Precedents.

Affidavit for Gaming.

STATE OF SOUTH-CAROLINA, }
District. }

Personally appeared before me, A. B., magistrate in and for the said district and State, C. D., who being duly sworn, deposes and says, that E. F., on the day of at [*here describe the place, whether tavern, house, field, or otherwise,*] in the district and State aforesaid, at a certain game, [*here describe the game played at, whether with cards, dice, or if at a gaming table, by setting out the letters, figures, or name by which such table is known*] with one G. H., did play and bet, and did win from him, the said G. H., a large sum of money, to wit, the sum of dollars, and that A. C. and B. D. are material witnesses thereto.

C. D.

Sworn to before me this }
day of 18 }

A. B.,
Magistrate.

Same for keeping a House for Gaming.

STATE OF SOUTH-CAROLINA, }
District. }

Personally appeared before me, A. B., magistrate in and for the district and State aforesaid, C. D., who being solemnly sworn, deposes and says, that E. F. did on the day of in the district and State aforesaid, at [*here describe the place, where, as in giving the name of the street, village, neighbourhood, public road, etc.,*] keep a certain [*here set forth the kind of place kept, whether tavern, retail store, or public house*] and that said [*tavern or inn*] was, on the day and year aforesaid, used as a public place for gaming, viz., one E. B. and A. C. then and there did play and bet at a certain game, [*here set forth the kind of game played at*] and that B. D. and E. O. are material witnesses thereto.

C. D.

worn to before me, this }
day of A. D., 18 }

A. B.,
Magistrate.

LAW OF MAGISTRATES.

Same against a person keeping a Gaming Table.

STATE OF SOUTH-CAROLINA, }
 District. }

Personally appeared before me, A. B., magistrate in and for the district and State aforesaid, C. D., who being solemnly sworn, deposes and says, that E. F., on the day of at [*here give the name of the town, village, street, neighbourhood, or other description of the place*] in the district and State aforesaid, did set up, keep, and use, a certain gaming table, commonly called [*here describe the table by its name, letters or figures*] for the purpose of gaming, and that B. C. and E. O. are material witnesses to prove the said charge.

C. D.

Sworn to before me, this }
 day of A. D., 18 }
 A. B.,

Magistrate.

Warrant to arrest persons for Gaming, or keeping a Gaming House or Table.

STATE OF SOUTH-CAROLINA, }
 District. }

By A. B., magistrate, in and for the said State.

To any lawful Constable.

Whereas, complaint upon oath has been made before me, by C. D., that E. F., [*here state the offence, as in the above affidavits*]: These are therefore to authorize and require you to arrest the said E. F., and bring him before me, to be dealt with according to law. Given under my hand and seal, this day of A. D., 18

A. B. [L. s.]
 Magistrate.

Warrant by two Magistrates to arrest persons having no Visible Estate.

STATE OF SOUTH-CAROLINA, }
 District. }

By A. B. and C. D., Magistrates in and for the said State.

To any lawful Constable.

Whereas, we have just cause to suspect that E. F. hath no visible estate, profession or calling, to maintain himself by, but doth, for the most part, support himself by gaming.

These are therefore to authorize and require you to arrest the said

Given under our hands and seals, this day of A. D., 18
A. B. [L. s.]
Magistrate.
C. D. [L. s.]
. Magistrate.

THE STATE OF SOUTH-CAROLINA.

The condition of this recognizance is such, that if the said E. F. shall personally appear before the Court of General Sessions, to be holden at the usual place of judicature, in _____, on the _____ Monday in _____, then and there to answer to a bill of indictment to be preferred against him for [*gaming, or keeping a gaming house, or table,*] and to do and receive what shall be enjoined by the Court, and not to depart the Court without license: and in the mean time, that the said E. F. do keep the peace of the State, and be of good behaviour towards all the citizens thereof, and especially, shall not game or keep a gaming house, then this recognizance to be null and void, or else to remain in full force and virtue.

A. B.
Magistrate.

E. F. [L. S.]
(Surety,) [L. S.]

LAW OF MAGISTRATES.

Recognizance before two Magistrates, by persons having no Estate or Profession.

STATE OF SOUTH-CAROLINA.

Be it remembered, that on the day of , in the year of our Lord one thousand eight hundred and , personally appeared E. F., and (*sufficient surety or sureties*), before us, A. B. and C. D., magistrates, in and for the said State, who acknowledged themselves indebted to the State of South-Carolina; that is to say, the said E. F., in the sum of five hundred dollars, and the said *surety* in the sum of five hundred dollars, like money, to be levied of their separate lands and tenements, goods and chattels, respectively, to and for the use of the said State, if the above mentioned E. F. shall fail in the performing the condition underwritten.

The condition of this recognizance is such, that if the said E. F. do keep the peace of the State, and be of good behaviour towards all the citizens thereof, and especially that he shall not play at any game or games, or keep any gaming house or table, then this recognizance to be null and void, or else to remain in full force and virtue.

Taken and acknowledged the day and }
year above written, before us, }

A. B.	E. F.	[L. s.]
Magistrate.		
C. D.	(Surety,)	[L. s.]
Magistrate.		

HABEAS CORPUS.

This writ lies, either at common law, in which case it may be granted by a judge, either in open Court, or at Chambers, to any person, whether infant or of full age, illegally restrained of his or her liberty, or by authority of the statute, 31 Ch., 2, c. 2, commonly called the *Habeas Corpus* Act, under which it is only grantable to persons confined for criminal or supposed criminal offences.

According to the decision in *Harvey vs. Huggins*, 2 Bail., 252, magistrates have no power to grant *Habeas Corpus* at common law, but their powers are limited to cases provided for in the Act. We proceed to inquire,

1st. WHAT PERSONS MAY HAVE HABEAS CORPUS UNDER THE ACT.

2d. BY WHOM, AND WHEN GRANTABLE.

- . OF THE DIRECTION, SERVICE, AND RETURN OF THE WRIT.
- h. OF THE HEARING, DISCHARGE, AND EFFECT THEREOF.
- h. PENALTY FOR NEGLECT OR REFUSAL.
- h. FEES OF OFFICER.
- h. PRECEDENTS.

1st. What persons may have Habeas Corpus.

All and every person, which now is, or hereafter shall be, within part of this Province, shall have, to all intents, constructions and purposes whatsoever, and in all things whatsoever, as large, plain, and effectual right to, and benefit of, the act commonly called *Habeas Corpus*, as if he were personally in the kingdom of England. 2 S. L., 400.

All persons entitled to benefit of the act.

By the 3d and 21st sections of the said Act, all persons, (other than persons convict, or in execution on legal process,) who stand committed or detained for any crime, (unless for treason or felony, plainly pressed in the warrant of commitment, or accessory before the fact petty treason or felony, or upon suspicion of petty treason or felony, being accessory thereto before the fact, *plainly* and *specially*, in the warrant of commitment,) are entitled to *Habeas Corpus*. And since, the Act of 1839, p. 14, all persons charged with felony are made liable, (except where the punishment of the offence is death, with benefit of clergy,) it would seem that persons committed for a bailable felony, would also be entitled to the benefits of the *Habeas Corpus* Act.

Persons confined for crime, except, etc.

If any persons shall have wilfully neglected, by the space of two whole terms, after his imprisonment, to pray a *Habeas Corpus* for his enlargement, such person shall not have any *Habeas Corpus* in vacation time, in pursuance of this Act.

Persons neglecting for two terms, to have none in vacation.

2d. By whom, and when grantable.

Any two magistrates are authorized and required to execute the provisions of an "Act for the better securing the liberty of the subject, and for the prevention of imprisonment beyond seas, commonly called the "*Habeas Corpus* Act;" and every matter, clause, or thing, therein contained, according to their true interest and meaning, as fully, exactly, and lawfully, as any judge of the Court of General Sessions or Common Pleas, or any Chancellor of this State. Act, 1839, page 15.

Any two magistrates.

Any of the Judges or Chancellors of this State are authorized, in vacation and out of term time, to grant an *Habeas Corpus*, under the

Any judge or seal of the Court, whereof he shall then be one of the judges, to any person committed for crime, (other than before excepted,) upon view of the copy or copies of the warrant or warrants of commitment and detainer, or upon oath made, that such copy or copies were denied to be given, by the person in whose custody the prisoner is detained, and upon request made in writing by the person detained, or any on his, or her behalf, attested and subscribed by two witnesses who was present at the delivery of the same. 1 S. L., p. 118, sec. 3.

None during Assizes, except in open Court. After the assizes are proclaimed for the county, where any prisoner is detained, no person shall be removed from the common jail upon any *Habeas Corpus*, granted in pursuance of this act, but upon any such *Habeas Corpus*, shall be brought before the judge of Assize in open Court, who is thereupon to do, what to justice shall appertain.

Provided, nevertheless, that after the Assizes are ended, any person or persons detained, may have his, or her *Habeas Corpus*, according to the direction and intention of this act.—Ibid, 122.

3d. Of the direction, service, and return of the Writ.

Direction. The writ is to be directed to the officer or officers in whose custody the party committed or detained shall be, and returnable immediately before the judge or other officer issuing the same, and it shall be served upon the said officer, or left at the jail or prison with any of the under officers, under keepers or their deputy; and the said officer shall within three days after service thereof, make return of such writ, and bring, or cause to be brought the body of the party committed or restrained, unto or before the person or persons before whom the writ is returnable, according to the command thereof, and shall then certify the true cause of his detainer, or imprisonment. 1st S. L., 117.

Service.

Return in three days.

If the place of imprisonment of the party be beyond the distance of twenty miles from the Court, and not above a hundred miles, such person shall be brought before the Court within ten days, and if beyond a hundred miles, then within twenty days, and not longer.—Ibid.

4th. Of the Hearing, Discharge, and Effect thereof.

Judge or magistrate shall hear, etc. If upon the hearing, the prisoner shall be entitled to his discharge, that is if he shall not be detained for treason or felony, not bailable, plainly expressed in the warrant of commitment, or as accessory thereto before the fact, or upon suspicion thereof, then the judge or magistrates before whom the prisoner shall be brought, shall within two days after the prisoner shall be brought before them, discharge the said prisoner, taking his, her, or their recognizance, with one or more

erty or sureties, in any sum according to their discretions, having regard to the quality of the prisoner and nature of the offence, for his appearance in the Court of Common Pleas, the term following, at the next assizes, sessions, or general jail delivery, for the district, city, or place where the commitment was, or the offence was committed, or in such other Court where the offence is properly cognizable, as the case shall require, and shall then certify the said writ, with the return thereof, and the said recognizance, into the said Court where appearance is to be made. 1st S. L., 118.

On discharge
to take
recognizance

Shall
certify writ
and recogni-
zance.

In the case of the State vs. Potter, Dudley, 296, it was ruled, that the protection intended by the *Habeas Corpus* Act, goes no farther than the enlargement of the prisoner on bail, if the offence be bailable in its nature; and where, upon supposed defect in the commitment or evidence, the prisoner was set at liberty without bail, it was held to be erroneous.

No person or persons, which shall be delivered or set at large upon any *Habeas Corpus*, shall at any time be again imprisoned or committed for the same offence, by any person or persons whatsoever, other than by the legal order and process of such Court, wherein he or they shall be bound by recognizance to appear, or other Court having jurisdiction of the cause; and if any person or persons shall knowingly, contrary to this act, re-commit or imprison, or knowingly procure, or cause to be re-committed or imprisoned, for the same offence, or pretended offence, any person or persons delivered or set at large as aforesaid, or be knowingly aiding or assisting therein, then he or they shall forfeit to the prisoner or party aggrieved the sum of £500; any colorable pretence or variation in the warrant or warrants of commitment, notwithstanding, to be recovered by the said prisoner or party grieved, his executors or administrators, against each offender, his executors or administrators, by any action of debt, writ, bill, plaint, or information. 1st S. L., 119.

Persons set
at large, not
to be re-com-
mitted but by
order of
Court.

Penalty for
so doing, or
assisting.

How recover-
ed.

Nothing in this act shall extend to discharge out of prison, any person charged in debt, or other action, or with process in any civil cause, but that after he shall be discharged of his imprisonment for such his criminal offence, he shall be kept in custody according to law in such other suit.—Ib., 120.

May still be
kept in
custody for
civil suit.

5th. Penalty for neglect or refusal.

If any officer or officers, his or their under officer or under officers, clerk keeper or under keepers, or deputy, shall neglect or refuse to

Officers, how
to be pro-
ceeded
against for
not obeying
such writs.

make the returns aforesaid, or to bring the body or bodies of the prisoner or prisoners, according to the command of the said writ, within the respective times aforesaid, or upon demand made by the prisoner, or person in his behalf, shall refuse to deliver, or within the space of six hours after demand, shall not deliver to the person so demanding, a true copy of the warrant or warrants of commitment and detainer of such prisoner, which he and they are hereby required to deliver accordingly; all and every the head jailors and keepers of such person, and such other person in whose custody the prisoner shall be detained, shall, for the first offence, forfeit to the prisoner or party grieved, the sum of £100; and for the second offence, the sum of £200, and shall, and is hereby made, incapable to hold or execute his said office; the said penalties to be recovered by the prisoner or party grieved, his executors and administrators, against such offender, his executors or administrators, by any action of debt, suit, bill, plaint, or information, in any of the King's Courts at Westminster, wherein no essoin, protection, privilege, injunction, wager of law, or stay of prosecution by "*non vult ulterius prosequi*," or otherwise, shall be admitted or allowed, or any more than one imparlance; and any recovery or judgement at the suit of any party grieved, shall be a sufficient conviction for the first offence; and any after recovery or judgement at the suit of a party grieved, for any offence after the first judgement, shall be a sufficient conviction to bring the officers or person within the said penalty for the second offence. 1st S. L., 119, sec. 5.

Penalty for
denying a
Habeas
Corpus.

It shall and may be lawful to and for any prisoner and prisoners as aforesaid, to move and obtain his or their *Habeas Corpus*, as well out of the High Court of Chancery or Court of Exchequer, as out of the Courts of King's Bench or Common Pleas, or either of them; and if the said Lord Chancellor or Lord Keeper, or any Judge or Judges, Baron or Barons, for the time being, of the degree of the Coif, of any of the Courts aforesaid, in the vacation time, upon view of the copy or copies of the warrant or warrants of commitment or detainer, or upon oath made that such copy or copies were denied as aforesaid, shall deny any writ of *Habeas Corpus*, by this act required to be granted, being moved for as aforesaid, they shall severally forfeit to the prisoner or party grieved, the sum of £500, to be recovered in manner aforesaid. 1st S. L., 120, sec. 10.

No person or persons shall be sued, impleaded, molested, or troubled for any offence against this act, unless the party offending be sued or

npleaded for the same within two years at the most, after such time wherein the offence shall be committed, in case the party grieved shall not be then in prison; and if he shall be in prison, then within the space of two years after the decease of the person imprisoned, or his or her delivery out of prison, which shall first happen. 1st S. L., 122, sec. 17.

Prosecutions for offences, within what time to be made.

Every person whatsoever to whom any power is given, either judicial or ministerial, by this act, and which, by virtue of this act, he is required and commanded to do, and shall wilfully neglect, refuse or omit to do the same, when the same shall be legally requested and demanded, according to the direction of the said *Habeas Corpus* Act, and when the person or persons so requesting and demanding the same are legally entitled to request or demand by the said Act, and are within the benefit of the same, according to the true intent and meaning thereof, that then and in such case, such person, whether magistrate or officer, wilfully so refusing, neglecting or omitting what this act requireth and commandeth him or them, for each such wilful neglect, refusal or omission, shall forfeit the sum of £500 current money of this province, loss of places or office, and undergo such penalties as by the said act is appointed, for every respective magistrate, officer, minister, or person whatsoever, within the kingdom of England, to be recovered in any of the Courts of Record in this Province, in such manner and form as by the said *Habeas Corpus* Act is appointed to be recovered in any of Her Majesty's Courts at Westminster. 2d S. L., 400, sec. 3.

Penalty on officers neglecting their duty.

If any magistrate shall wilfully refuse, neglect, or omit to grant the writ of *Habeas Corpus* to any person or persons, requesting or demanding the same, who may be legally entitled to request or demand the same by the said Act, he shall forfeit for any such default the sum of five hundred dollars. Acts 1838, p. 15, sec. 9.

Penalties on magistrates refusing to grant the Habeas Corpus Act.

Every sheriff, deputy sheriff, or jailor, shall have power, and he is authorized, required and commanded, to give due obedience to the execution of every writ of *Habeas Corpus*, made or signed by any person or persons whatsoever, by law empowered to make, sign and grant the same, according to the provisions of an Act for the better securing the liberty of the subject, and for the prevention of imprisonments beyond the seas, commonly called the *Habeas Corpus* Act, made of force in this State; and shall do and perform any matter or thing, which by the same he may be required to do; and if he shall wilfully neglect, refuse, or omit to obey or perform the same, when legally requested and demanded, in such case, for each such neglect,

Sheriff to obey Habeas Corpus.

Penalties for refusing.

refusal or omission, he shall forfeit the sum of five hundred dollars, to be recovered by indictment. Acts 1839, p. 33, sec. 43.

6th. Of the Fees of Officers.

Officer bringing prisoner, entitled to fees in advance.

The officer directed to bring up the prisoner is entitled to have his fees in advance for bringing up the prisoner; said fees to be ascertained by the judge or Court that awarded the writ, and shall be endorsed thereon; and by Act of 1827, p. 57, shall be six cents per mile, in addition to all necessary charges; he is also entitled to the bond of the prisoner for the fees of bringing him back, should he be remanded by the Court. 1st S. L., 117.

What charges sheriff shall have.

In the case of Taggart vs. Hutson, it was ruled, that under the clause "all necessary charges," the sheriff was entitled to the amount paid out for support of himself and prisoner, and going to and returning from the place appointed, and also for hire of horse and guard, and that the prisoner was liable to pay said charges, although acquitted of the offence for which he was charged. Rice's R., 300.

7th. Precedents.

Petition for a Writ of Habeas Corpus.

SOUTH-CAROLINA, }

To any two magistrates for the State aforesaid.

The humble petition of of in the State aforesaid, sheweth that your petitioner is retained in the custody of sheriff of in jail, by virtue of a commitment under the hand and seal of one of the magistrates for the said State; your petitioner, therefore, humbly prays your Honors to grant him a writ of *Habeas Corpus*, to bring your petitioner before your Honors, that the cause of the commitment being known and seen, such further proceedings may be had thereon, as are agreeable to law and justice.

Plaintiff's Attorney.

Writ of Habeas Corpus.

To Esq., sheriff of You are hereby commanded, that the body of by whatever name the said is called into and under custody, committed and detained, as it is said, together with the day and cause of caption and detention of the said you have before us, the subscribing at immediately after the receipt hereof, to do and receive what we the said magistrates, shall then and

there consider in that behalf; and have you then and there this writ, witness, &c., &c.

A. B.,
Magistrate.

C. D.,
Magistrate.

All writs of *Habeas Corpus* must be marked in this manner, "*Per statutum, tricesimo primo, Caroli secundi Regis*," and shall be signed by the person awarding the same. ^{Endorsement.}

On hearing the return in this case, and it appearing to us, that the said prisoner is detained by warrant of commitment for an offence not bailable, it is ordered that he be remanded, to await his trial. ^{Order to remand.}

This day of
A. D., }

A. B.,
Magistrate.

C. D.,
Magistrate.

On hearing the return in this case, and it appearing that the said prisoner is detained in custody under a warrant of commitment for a bailable offence, and he having entered into recognizance, with surety according to law; it is ordered, that he be discharged from his imprisonment. ^{Order of discharge.}

This day of
A. D., }

A. B.,
Magistrate.

C. D.,
Magistrate.

HARBORING,

Is the affording shelter, concealment or entertainment to an absconding apprentice, slave, or articulated or apprenticed seaman of another. In the former case, the only remedy is by an action for damages; in the two latter, the party injured may proceed either by civil action, or by indictment.

1st. HARBORING SEAMEN.

2d. HARBORING SLAVES.

1st. Seamen.

Penalty for
secreting
seamen.

If any person shall, either on shipboard or on shore, harbor or secrete a seaman who shall have signed an agreement to proceed on a voyage, or shall have deserted or absented himself without leave from the captain of the ship or vessel to which he may belong, under such agreement, every person so offending, shall, for every such seaman so harbored or secreted, forfeit and pay the sum of fifty dollars, one half whereof shall go to the informer; and upon a second conviction, the person so offending, if the keeper of a public or lodging house for seamen, in addition to the penalty before provided, shall forfeit his or her license. And in case any such seamen, or any boy apprenticed on board any ship or vessel, shall be harbored, secreted, or detained, it shall be lawful for any justice of the peace, upon complaint, on oath, made by the master of the said ship, or on his behalf, to inquire into the matter, and if he shall see right, by warrant under his hand and seal, to cause search to be made into any place wherever the said seaman or apprentice may be harbored or secreted, and to cause such seaman or apprentice to be restored to the master of the said ship. 6th S. L., 557, sec. 1st.

How far
provisions
of former
act may
extend.

The provisions of the first section of an act entitled "An Act to prevent the harboring of deserted seamen," passed on the 21st day of December, one thousand eight hundred and thirty-six, shall extend to every agreement to proceed or continue on a voyage, made in this State or elsewhere, by a seaman, and whether in contemplation of a voyage to be commenced in this State or elsewhere; provided, that the said agreement, at the time when any such seaman may be harbored or secreted, contrary to the provisions of the said Act, shall not have been fully executed and determined, but shall be of force and binding on such seamen, according to the laws of this State, or of the country where the same was entered into, or to which the ship or vessel in which such voyage was to be made, may belong. 6th S. L., 576, sec. 1 and 2.

Articles of
ship,
admissible
evidence.

On the prosecution or trial of any indictment under the aforesaid Act, or any Act amending the same, the articles of the ship or vessel, authenticated by the affidavit of the captain, sworn to before any notary public or justice of the peace of this State, shall be admissible in evidence, and shall be sufficient to establish the fact, that any seaman whose name appears subscribed thereto, has signed the agreement contained in such articles, until the contrary be made to appear by proof; any law, usage or custom to the contrary thereof in any wise notwithstanding.—*Ibid.*

2d. Slaves.

If any free negro, mulatto or mestizo, or any slave, shall harbor, conceal or entertain any slave that shall run away or shall be charged with any criminal matter, every free negro, mulatto and mestizo, and every slave, who shall harbor, conceal or entertain any such slave, being duly convicted thereof, according to the directions of this Act, if a slave, shall suffer such corporal punishment, not extending to life or limb, as the justice or justices who shall try such slave shall, in his or their discretion, think fit; and if a free negro, mulatto or mestizo, shall forfeit the sum of ten pounds, current money, for the first day, and twenty shillings for every day after, to the use of the owner or owners of such slave so to be harbored, concealed or entertained, as aforesaid, to be recovered by warrant, under the hand and seal of any one of his Majesty's justices of the peace, in and for the county where such slave shall be so harbored, concealed or entertained, in like manner as debts are directed to be recovered by the Act for trial of small and mean causes; and that in case such forfeitures cannot be levied, or such free negroes, mulattoes or mestizoes shall not pay the same, together with the charges attending the prosecution, such free negro, mulatto or mestizo shall be ordered by the said justice to be sold at public outcry, and the money arising by such sale shall, in the first place, be paid and applied for and towards the forfeiture due, made payable to the owner or owners, and the charges attending the prosecution and sale, and the overplus, (if any,) shall be paid by the said justice into the hands of the public treasurer, to be afterwards paid and applied in such manner as by the General Assembly of this Province shall be directed and appointed. 7th S. L., 407, sec. 29th.

Penalty on
free negroes
or slaves for
harboring
runaways.

If any white person shall harbor, conceal or entertain any runaway or fugitive slave, such person shall be liable to be indicted for a misdemeanor, or prosecuted in a civil action for damages, at the election of the owner or person injured: and in case any person, being indicted, shall be convicted of said offence, such person shall be fined and imprisoned at the discretion of the Court, not exceeding one thousand dollars fine, nor one year's imprisonment. 7th S. L., 460, sec. 1 & 2.

Penalty on
white
persons for
harboring
slaves.

If any free negro, mulatto or mestizo shall harbor, conceal or entertain any fugitive or runaway slave, and be convicted thereof before two justices and five freeholders, he shall suffer such corporal punishment, not extending to life or limb, as the said justices and freeholders who try such offender, shall, in their discussion think fit.—Ibid.

Penalty on
free negroes.

An indictment, under the Act of '21, for harboring a slave, is not

barred, because a civil action for the same offence was first commenced, and is pending at the trial of the indictment. *State vs. Stein*, 1st Richardson's Reports, 189.

Under the Act, the defendant may be proceeded against criminally and civilly, at the same time, but the prosecutor will be put to his election which case to try; or the trial of one case may be pleaded in bar of the other.—[*ibid.*]

HAWKERS AND PEDLARS.

A hawker and pedlar is an itinerant trader, who carries goods through the streets from town to town, and from place to place, exposing the same to sale.

In the case of the *State vs. Belcher*, 1 McMullan, 42, it was held, that the sale of goods by a transient person in a house or store, at auction or private sale, was not within the Acts against hawkers and pedlars.

1st. WHO MAY GRANT LICENSE, TO WHOM, AND THE CONDITIONS AND EXTENT THEREOF.

2d. PENALTY FOR PEDDLING WITHOUT LICENSE.

3d. POWERS AND DUTIES OF MAGISTRATES, SHERIFFS, &c., THEREIN.

1st. *Who may Grant, &c.*

Exclusive power to license, vested in commissioners of roads, etc.

Conditions of each license.

Ten years residence, etc.

Limited to the district or parish.

The sole and exclusive power of granting licenses to hawkers and pedlars, be and the same is hereby vested in the Commissioners of Roads, in their respective districts and parishes, a majority of whom, in their respective districts or parishes, shall at any stated meeting, and at no other time, hear all applications for such license to hawk or peddle, and shall grant or reject such application for one year, as to them shall seem proper: *Provided*, that such applicant shall, before he receives such license, pay into the hands of the said commissioners for such district or parish, the sum of fifty dollars, and shall enter into bond as now provided by law, except that it be taken and approved by the body granting the license; *Provided, also*, such applicant shall have been a citizen of the district the preceding ten years, and legally entitled to vote, at the time of such application, for members of the General Assembly; and provided likewise, that such license so granted, shall confer the privilege to hawk and peddle within the

limit only of the district or parish for which the body granting it have themselves been appointed, and shall not be extended in any manner so enable any other person to hawk and peddle, saving only the person actually named in the license: *provided, also*, that in any district or parish, where there now exists, or may hereafter exist, by law, more than one Board of Commissioners of Roads, a license taken from any one of said Boards shall be sufficient to authorize any person who has complied with the provisions of this act, to hawk and peddle within said district or parish. Act 1843, p. 262.

Districts, &c.
having more
than one
Board.

Before a license shall be granted to any hawker or pedlar, the Commissioners of Roads shall take from the said hawker or pedlar a recognizance, in the penalty of one thousand dollars for himself, and five hundred dollars for each of two approved sureties, freeholders of this State, conditioned, that the said hawker or pedlar, during the time for which license may be granted to him, shall be of good behaviour, and especially refrain from all violations of the laws of this State, against trading with negroes—against seditious or inflammatory publications, or conduct—against gaming—and against the retailing of spirituous liquors without license: and the said recognizance, upon allegation of breach of the condition, shall be proceeded upon by *scire facias*, as in other cases; and proof of the breach having been made, forfeiture, at the discretion of the Court, shall be adjudged. 6th S. L., 433, sec. 2d.

Granting
license.

2d. Penalty, &c.

If any hawker or pedlar, shall sell, or expose to sale, any goods, wares or merchandize, in any district in this State, without having obtained a lawful license for that purpose, according to the provisions of the Act aforesaid, as amended by this Act, such hawker or pedlar, on conviction thereof by indictment, shall forfeit and pay the sum of five thousand dollars, instead of the penalty imposed by the first section of the said Act. 6th S. L., p. 529, sec. 2d.

Penalty for
selling with-
out license.

3d. Powers and Duties of Magistrates.

If any hawker or pedlar shall refuse to submit for inspection his license, on the demand of any magistrate, it shall be lawful for such magistrate to issue his warrant, directed to the sheriff, or any constable, requiring the detention of the goods, wares and merchandize in the possession of such hawker or pedlar, together with the carriage used for the transportation thereof, if there be one; and if no release

Hawkers
and pedlars
not produ-
cing licenses.

shall be obtained within ten days from the seizure aforesaid, by the production of a license granted prior to such seizure, or of a recognizance or receipt, and payment of fees and expenses as required by law, the said magistrate may order a sale of the articles so seized, to be made by the said sheriff or constable, on a notice of ten days. Act of 1830, p. 22, sec. 26.

Proceedings
against haw-
kers and
pedlars.

Any sheriff thereunto specially authorized by a magistrate, by a warrant, shall seize and detain the goods, wares, merchandize and carriage, in the possession of any hawker or pedlar, until a release shall be directed by some magistrate, upon payment to him of fees and expenses of seizure and detention, and the production to him of a license granted to the said hawker or pedlar, prior to the warrant aforesaid, or of a recognizance entered into by the said hawker or pedlar, to answer an indictment for violating the Act concerning hawkers and pedlars, or of a receipt of a jailor of the district, of the body of the said hawker or pedlar, committed to jail under a warrant against him for violating the law. The sheriff, after ten days notice, shall proceed, by virtue of an order of said magistrate, to sell the said articles, or so much thereof as will cover the amount of five hundred dollars, and all expenses; and after raising the said amount, (if so much there be,) the remainder of the articles seized, or of the proceeds of sale, shall be delivered or paid to the said hawker or pedlar, and all expenses of sale and fees being set aside, five hundred dollars, if so much there be, shall be paid into the hands of the Commissioners of Public Buildings. Act 1830, p. 33, sec. 44.

HOGS, SHEEP, AND GOATS.

Penalty for
stealing hogs,
sheep, etc.

If any person or persons shall be indicted and found guilty of stealing any sheep, goats, or hogs, he, she, or they, shall be subject to a fine or penalty of five pounds sterling for each and every sheep, goat, or hog, for stealing of which he, she, or they may be convicted as aforesaid; and in case any such offender or offenders shall not be able to pay such fine or penalty, he, she, or they, instead of such fine or penalty, shall be subject to be publicly whipped, and severally receive a number of lashes or stripes, not exceeding thirty-nine stripes or lashes, on the bare back; and if any of the said offenders shall, at any time afterwards, commit or repeat the like offence, he, she or they, on conviction thereof, shall be subject to be publicly whipped,

and severally receive a number of lashes or stripes, not exceeding fifty stripes or lashes, on the bare back. 5th S. L., 140, sec. 4, 5, and 7.

If any person or persons shall be lawfully convicted of wilfully and knowingly marking, branding, or disfiguring of any sheep, goat or hog, of, or belonging to any other person, the said offender or offenders shall, for each and every sheep, goat, or hog, of which he, she or they shall or may be convicted of branding or disfiguring as aforesaid, be subject to the penalty of five pounds; and on non-payment thereof, he, she or they shall be publicly whipped, and severally receive a number of stripes or lashes, not exceeding thirty-nine stripes or lashes, on the bare back; and in case any of the said offenders shall afterwards repeat or commit a like offence, he, she, or they, on conviction thereof, shall be liable to the penalty or fine of ten pounds for each and every sheep, goat, or hog, by him, her, or them killed, maimed or disfigured, and of which he, she or they shall be convicted as aforesaid; and in case of non-payment of the said penalty or fine, he, she or they shall be publicly whipped, and severally receive a number of lashes or stripes, not exceeding fifty stripes or lashes, on the bare back.—Ib.

Penalty for
disfiguring
sheep, hogs,
etc.

It shall not be lawful hereafter for any slave to brand, or mark any horse, mare, gelding, colt, filley, ass, mule, bull, cow, steer, ox, calf, sheep, goats or hogs, but in the presence of, and by the direction of some white person, under the penalty of being whipped; provided, the same whipping shall not exceed fifty lashes, by order of any one or more of the justices of the peace of the county or parish before whom such offence shall be proved by the evidence of any white person or slave.—Ib.

Slaves not to
brand any
animal, ex-
cept by the
direction of a
white
person.

All witnesses, who shall be duly subpoenaed or bound over in recognition to attend and give evidence against all or any of the offenders aforesaid, and do accordingly attend, shall be entitled to the same allowance or charges as witnesses attending trials in the Court of Common Pleas; which said allowance and charges shall be defrayed and paid out of the above fines and penalties, and on defect thereof, out of any other fines or forfeitures that may be in the hands of, or received by the clerk of the Court where such offenders are tried.—Ib.

The word "pig" not being in the Act of Assembly against hog stealing, an indictment for stealing a pig, contrary to that Act, cannot be supported. *State vs. S. McLain*; 2d Brevards Rep., 443.

Since the Act of Assembly, 1789, against cattle stealing, all indict-

LAW OF MAGISTRATES.

ments for that offence must conclude against the Act of Assembly, and cannot be maintained for larceny at common law.

Indictment for larceny at common law, for stealing two sheep, was quashed. *State vs. Ripley*; 2d Brevard's Rep., 300.

To chase and shoot a hog with a felonious intent, without removing it after it is shot, will not constitute hog stealing. *State vs. Seagler*; 1st Richardson's Rep., 30.

HOMICIDE.

Offences against the life of a man comes under the general name of homicide, which in our law signifies the killing of a man by a man. 1st Haw. P. C., c. 26.

1st. JUSTIFIABLE HOMICIDE.

2d. EXCUSABLE HOMICIDE.

3d. FELONIOUS HOMICIDE.

1st. *Justifiable Homicide.*

By comm and of law.—Amongst the acts of unavoidable necessity, may be classed the execution of malefactors, by the person whose office obliges him, in the performance of public justice, to put those to death who have forfeited their lives by the laws and verdict of their country. These are acts of necessity, and even of civil duty; and therefore not only justifiable, but commendable, when the law requires them. But the law must require them, otherwise, they are not justifiable; and, therefore, wantonly to kill the greatest of malefactors, would be murder: and we have seen that all acts of official duty should, in the nature of their execution, be conformable to the judgment by which they are directed. 1 Russ., 345.

Execution of
malefactors.

In advancement of public justice.—Amongst the acts done by the permission of the law, for the advancement of public justice, may be reckoned those of the officer, who, in the execution of his office, either in a civil or criminal case, kills a person who assaults and resists him. The resistance will justify the officer in proceeding to the last extremity. So that in all cases, whether civil or criminal, where persons having authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, they may

Officers kill-
ing those
who assault
and resist
them.

apel with force, and need not give back; and if the party making resistance is unavoidably killed in the struggle, this homicide is justifiable. A rule founded in reason and public utility; for few men would quietly submit to an arrest, if in every case of resistance, the party empowered to arrest were obliged to desist and leave the business undone: and a case, in which the officer was holden guilty of manslaughter, because he had not first given back, as far as he could, before he killed the party who had escaped out of custody, in execution for a debt, and resisted being retaken, seems to stand alone, and has been mentioned with disapprobation. 1st Russell, 546.

When the party does not resist, but merely flies to avoid the arrest, the conduct of the officer should be cautiously regulated by the nature of the proceeding. For, in civil cases, and also in the case of a breach of the peace, or any other misdemeanor, short of felony, if the officer should pursue a defendant flying in order to avoid an arrest, and should kill him in the pursuit, it will be murder or manslaughter, according to the peculiar circumstances by which such homicide may have been attended. But if a felony be committed, and the felon fly from justice, or a dangerous wound be given, it is the duty of every man to use his best endeavors for preventing an escape; and if in the pursuit the party flying be killed, where he cannot be otherwise overtaken, this will be deemed justifiable homicide. This rule is not confined to those who are present, so as to have ocular proof of the fact, or to those who first come to the knowledge of it; for if in these cases fresh suit be made, and *a fortiori*, if hue and cry be levied, all who join in aid of those who began the pursuit, are under the same protection of the law. And the same rule holds, if a felon, after arrest, break away as he is carrying to jail, and his pursuers cannot retake without killing him.—Ib., 547.

Where a person is indicted for felony, and will not suffer himself to be arrested by an officer, having a warrant for that purpose, the officer may lawfully kill him if he cannot otherwise be taken; though such person be innocent, and though in truth no felony have been committed; but it seems that this must be understood only of arrests by officers, and does not extend to arrests by private persons of their own authority.—Ibid, 548.

In the case of a riot or rebellious assembly, the peace officers and their assistants, endeavoring to disperse the mob, are justified, both at common law and by the Riot Act, in proceeding to the last extremity, in case the riot cannot otherwise be suppressed. And it has been said, that perhaps the killing of dangerous rioters may be justified by any

Officers
killing those
who fly from
arrest.

Officers
dispersing a
mob, etc.

private persons who cannot otherwise suppress them, or defend themselves from them, inasmuch as every private person seems to be authorized by the law to arm himself for the preservation of the peace. Ibid.

Jailors and their assistants killing prisoners.

Jailors and their officers are under the same special protection as other ministers of justice; and, therefore, if in the necessary discharge of their duty, they meet with resistance, whether from prisoners in civil or criminal suits, or from others, in behalf of such prisoners, they are not obliged to retreat as far as they can with safety, but may freely, and without retreating, repel force by force; and if the party so resisting happen to be killed, this, on the part of the jailor, or his officer, or any person coming in aid of him, will be justifiable homicide. Ibid.

Homicide in the prevention of any forcible and atrocious crime.

For prevention of Crime.—A man may repel force by force in defence of his person, habitation, or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is justifiable. But it has been holden, that this rule does not apply to any crime unaccompanied with force, as picking of pockets. It seems, therefore, that the intent to murder, or commit other felonies attended with force or surprise, should be apparent, and not be left in doubt: so that if A. make an attack upon B., it must plainly appear by the circumstances of the case (as the manner of the assault, the weapon, &c.,) that the life of B. is in imminent danger; otherwise, his killing the assailant will not be justifiable self-defence. And the rule clearly extends only to cases of felony; for if one come to beat another, or to take his goods merely as a trespasser, though the owner may justify the beating of him, so far as to make him desist, yet if he kill him, it is manslaughter. But if a house be broken open, though in the day time, with a felonious intent, it shall be within the rule. 1st Russell, 549.

Persons killing those who are attempting to rob or murder, or commit burglary, etc.

A statute made in affirmance of the common law, after reciting that it had been doubted whether, if any person should attempt feloniously to rob or murder any persons, in or near any common highway, cart-way, or foot-way, or in their mansions, messuages, or dwelling places, or attempt to break any dwelling-house in the night time, and should happen in such felonious intent to be slain by those whom they should so attempt to rob or murder, or by any person being in their dwelling house, attempted to be broken open, the person so happening to slay

so attempting to commit murder or burglary, should forfeit chattels, enacts, "that if any person or persons be indicted of or for the death of any such evil-disposed person or pertaining to murder, rob, or burglarily to break mansion-houses, said, the person or persons so indicted or appealed thereof come by verdict so found and tried, shall not forfeit or lose enements, goods, or chattels, for the death of any such evil won in such manner slain, but shall be thereof and for the acquitted and discharged," in like manner as if lawfully the death of such person. But though the statute only certain cases, it must not be taken to imply an exclusion of instances of justifiable homicide which stand upon the same reason and justice. So that the killing of one who attempts rning of a house, is free from forfeiture without the aid of —Ibid, 550.

known felony is attempted upon any one, not only the party ay repel force by force, but his servant attending him, or erson present, may interpose to prevent the mischief, and ue, the party so interposing will be justified. So, where is made to commit arson, or burglary, in the habi- part of the owner's family, or even a lodger, may the assailants, in order to prevent the mischief intended. 552.

ses of mutual combats, or sudden affrays, a person interfer- ict with much caution. Where indeed, a person interferes o combatants with a view to preserve the peace, and not to th either, giving due notice of his intention, and is under ty of killing one of them in order to preserve his own life e other combatant, it being impossible to preserve them by s, such killing will be justifiable: but, in general, if there r and an actual fighting and striving between persons, and in, and take part with one party, and kill the other, it will fiable homicide, but manslaughter.—Ibid.

be observed, that as homicide committed in the prevention Time within and atrocious crimes, is justifiable only upon the plea of which homicide it cannot be justified, unless the necessity continue to the will be justifiable. the party is killed. Thus, though the person upon whom attack is first made be not obliged to retreat, but may pur- n till he finds himself out of danger; yet, if the felon be he has been properly secured, and when the apprehension as ceased, such killing will be murder: though perhaps, if

the blood were still hot from the contest or pursuit, it might be held to be only manslaughter, on account of the high provocation.—*Ibid.*

2d. *Excusable Homicide.*

By Misadventure.

In Self Defence.

By Misadventure.—Homicide *per infortunium*, or misadventure, is where a man doing a lawful act, without any intention of hurt, and using proper precaution to prevent danger, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off, and kills a stander-by; or where a person, qualified to keep a gun, is shooting at a mark and undesignedly kills a man; for the act is lawful, and the effect is merely accidental. So, when a workman throws rubbish from a house, in the ordinary course of his work, by which a person underneath is killed, this is homicide by misadventure only, if it were done in a retired place, where there was no probability of persons passing by, and none had been seen about the spot before; or if timely and proper warning were given to such as might be below. So, where a person is moderately correcting his child, a master his apprentice, or scholar, or an officer punishing a criminal, (as by whipping,) and happens to occasion his death, it is only misadventure; for the act of correction was lawful: but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least; and in some cases (according to circumstances) murder; for the act of immoderate correction, is unlawful. Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental death in the rider, for he has done nothing unlawful: but it is manslaughter in the person who whipped him, for the act was a trespass, and at best a piece of idleness of inevitable dangerous consequence. Where one is lawfully using an innocent diversion, as shooting at butts, or at a bird, &c., by the glancing of an arrow, or such like accident, kills another, this is only homicide by misadventure. So, where a person happens to kill another in playing a match of foot ball, wrestling, or such like sports, which are attended with no apparent danger of life, and intended only for the trial, exercise and improvement of the strength, courage and activity of the parties. In general, if death ensues in consequence of an idle, dangerous, and unlawful sport, the slayer is guilty of manslaughter, and not misadventure only, for these are

cts. Thus, if a man, by shooting of a gun, or throwing stones in a highway, or other place where men usually resort, by throwing at another wantonly, in play, which is a dangerous sport, and without the least appearance of any good intent; or by doing any idle action as cannot but endanger the bodily hurt of some person; or by tilting or playing at hand-sword without the king's licence; or by parrying with naked swords, covered with buttons or staves, or with swords in the scabbard, or such like rash sports, which ought not to be used without the manifest hazard of life, he is guilty of manslaughter. 2d Tomlins, 100.

defence.—Homicide in a man's own defence, seems to be, when a man, who hath no other possible means of preserving his life from a combat with him, on a sudden quarrel, kills the person by which he is reduced to such an inevitable necessity. And not only he who, in an assault, retreats to a wall, or some such strait, beyond which he can go no farther before he kills the other, is judged by the law to be upon an unavoidable necessity; but also he, who being assaulted in a manner, and in such a place that he cannot go back, without necessarily endangering his life, kills the other without retreating, and notwithstanding a person who retreats from an assault, may give the other wounds in his retreat, yet if he give him a mortal wound until he got thither, and then kill him, he is guilty of homicide, *se defendendo* only. But if the mortal wound was first given, and then it is manslaughter. And an officer who kills one that is in the execution of his office, and even a private person who kills one who feloniously assaults him in the highway, may justify himself without ever giving back at all. But if a person, upon a sudden impulse, strike another, and then fly to the wall, and there in his defence kills the other, this is murder. Hereof there can be no excuse, either before or after the act, because it is not done without malicious intent, but upon inevitable necessity. Grimke, 222.

3d. *Felonious Homicide,*

the killing of a human creature, of any age or sex, without just excuse.

a slave under sudden heat.—If any person shall kill another on sudden heat and passion, such person, on conviction, shall be fined a sum not exceeding five hundred dollars, and be imprisoned for a term not exceeding six months. 6th S. L., p. 158, sec. 2d.

Murder.—Is the unlawful killing of another without any just excuse, either express or implied; which may be voluntarily upon a

sudden heat, or involuntarily, but in the commission of some unlawful act.

Words of provocation.

It has been shewn, that the most grievous words of reproach, temptuous and insulting actions or gestures, or trespasses on lands or goods, will not free the party killing from the guilt of murder if upon such provocation a deadly weapon was made use of with intention to kill, or to do some great bodily harm, was otherwise manifested. But if no such weapon be used, or intention manifested, the party so provoked give the other a box on the ear, or strike with a stick or other weapon not likely to kill, and kill him unexpectedly and against his intention, it will be only manslaughter. It is, it is said to have been held in one case, that words of menace of harm, are a sufficient provocation to reduce the offence of murder to manslaughter: but it has been considered that such words ought at least, to be accompanied by some act denoting an immediate intention of following them up by an actual assault. But though words of slighting, disdain, or contumely, will not of themselves make provocation as to lessen the crime into manslaughter, yet it is said that if A. give indecent language to B., and B. thereupon strike but not mortally, and then A. strike B. again, and then B. kill A. that this is but manslaughter. The stroke by A. was deemed provocation, and the conflict a sudden falling out; and on these grounds the killing was considered as only manslaughter. 1 East, 486.

Provocation by assault.

When an assault is made with violence or circumstances of great injury upon a man's person, as by pulling him by the nose, a party so assaulted kills the aggressor, the crime will be reduced to manslaughter, in case it appears that the assault was resented immediately, and the aggressor killed in the heat of blood, the *furor* occasioned by the provocation. So if A. be passing along the street and B. meeting him, (there being convenient distance between them and the wall) take the wall of him and jostle him, and thereby kill B., it is said that such jostling would amount to a provocation which would make the killing manslaughter. And again it is said to have been considered, that where A. riding on the road, B. threw the horse of A. out of the track, and then A. alighted and killed B. it was only manslaughter. But, in the two last cases, it should be that the first aggression must have been accompanied with circumstances of great violence or insolence; for it is not every trivial provocation, which, in point of law, amounts to an assault, that will reduce the crime of the party killing to manslaughter.

will not be considered as sufficient provocation to extenuate where the revenge is disproportioned to the injury, and out-and-barbarous in its nature: but, when the blow which gave occasion has been so violent, as reasonably to have caused a transport of passion and heat of blood, the killing which ensued regarded as the consequence of human infirmity, and entitled to consideration. Thus, where a woman, after some words on both sides, gave a soldier a box on the ear, which she returned, by striking her on her breast with the pommel of his sword, and the woman then running away, the soldier pursued, and struck her in the back with his sword; Holt., C. J., at first concluded to be murder; but, upon its coming out in the progress of the trial that the woman had struck the soldier with a patten on the head with great force, so that the blood flowed, it was holden clearly to be manslaughter. In this case, the smart of the soldier's wound and the effusion of blood, might possibly have kept his indignation to the moment of the fact. 1 Russell, 487.

a man finds another in the act of adultery with his wife, and in the first transport of passion, he is only guilty of manslaughter, and that in the lowest degree; for the provocation is grievous, as the law reasonably concludes cannot be borne in the transport of passion. But it has already been shewn, that the husband of an adulterer deliberately, and upon revenge, would be murder. Russ., 488.

are instances where slight provocations have been considered as extenuating the guilt of homicide, upon the ground, that the motive of the party killing upon such provocations, might fairly be ascribed to an intention to chastise, rather than to a cruel and malicious malice. But, in cases of this kind, it must appear, that the provocation was not urged with brutal violence, nor greatly disproportionate to the offence; and the instrument must not be such as, from its nature, was likely to endanger life. Thus, where A. finding a boy on his land, in the first transport of his passion, beat him, and he killed him, it was holden to be manslaughter: it must be understood, that he beat him, not with a mischievous intent, but merely to chastise him for the trespass, and to deter him from committing it again. And of the case of the keeper of a park, finding a boy stealing wood in his master's ground, tied him to a post, and beat him, upon which the boy running away, the keeper killed him; it is said, that if the chastisement had been more moderate, it had been but manslaughter; for, between persons nearly

Provocation
by detecting
adulterer.

Provocations
of a slight
kind, etc.

connected together by civil and natural ties, the law admits the force of a provocation done to one to be felt by the other. And *a fortiori*, if the master had himself caught the trespasser, and beat him in such a manner as showed a desire only to chastise and prevent a repetition of the offence, but had unfortunately, and against his intent, killed him, it would only have been manslaughter.—Ib.

Ducking a pickpocket.

Where a person, whose pocket has been picked, encouraged by a concourse of people, threw the pickpocket into an adjoining pond, in order to avenge the theft, by ducking him, but without any apparent intention to take away his life, and the pickpocket was drowned, it was ruled to be only manslaughter; for though this mode of punishment is highly unjustifiable and illegal, yet the law respects the infirmities and imbecilities of human nature, when certain provocations are given. 1st Russ., 489.

Father taking up the quarrel of his son.

In a case where the prisoner's son having fought with another boy, and been beaten, ran home to his father, all bloody, and the father presently took a cudgel, ran three quarters of a mile, and struck the other boy upon the head, upon which he died; it was ruled to be manslaughter, because done in sudden heat and passion: but the true grounds of the judgement seem to have been, that the accident happened by a single stroke given in heat of blood, with a cudgel, not likely to destroy, and that death did not immediately ensue.—Ib.

Sudden quarrel.

If, upon a sudden quarrel, the parties fight upon the spot, or if they presently fetch their weapons, and go into a field and fight, and one of them be killed, it will be but manslaughter, because it may be presumed that the blood never cooled. And it must be observed, with regard to sudden rencounters, that when they are begun, the blood, previously too much heated, kindles afresh at every pass or blow; and in the tumult of the passions, in which mere instinct, self-preservation, has no inconsiderable share, the voice of reason is not heard; therefore the laws, in condescension to the infirmities of flesh and blood, has extenuated the offence. 1st Russ., 495.

First blow immaterial, if quarrel sudden, and combat equal.

A. uses provoking language or behaviour to B., and B. strikes him, upon which a combat ensues, in which A. is killed; this is holden to be manslaughter; for it was a sudden affray, and they fought upon equal terms; and in such combats, upon sudden quarrels, it matters not who gave the first blow. But it would be otherwise, if the terms were not equal, and if the party killing sought or took undue advantage; as if B. in the foregoing case, had drawn his sword and made his pass at A., the sword of A. being then undrawn, and thereupon A. had drawn, and a combat had ensued, in which A. had been killed; for

this would have been murder, inasmuch as B., by making the pass, his adversary's sword being undrawn, showed that he sought his blood. And A's endeavor to defend himself, which he had a right to do, will not excuse B.: but if B. had first drawn, and forbore till his adversary had drawn too, it had been no more than manslaughter. 1 Russell, 496.

It has been shewn that where death ensues from an act done in the prosecution of a felonious intention, it will be murder: but a distinction is taken in the case of an act done with the intent only of committing a bare trespass; as if death ensues from such act, the offence will be only manslaughter. Thus, though if A. shoot at the poultry of B., intending to steal them, and by accident kill a man, it will be murder; yet, if he shoot at them wantonly, and without any such felonious intention, and accidentally kill a man, the offence will be only manslaughter. And any one who voluntarily, knowingly, and unlawfully, intends hurt to the person of another, though he intend not death, yet, if death ensue, is guilty of murder or manslaughter, according to the circumstances of the nature of the instrument used, and the manner of using it, as calculated to produce great bodily harm or not. And if a man be doing an unlawful act, though not intending bodily harm to any one, as if he be throwing a stone at another's horse, and hit a person and kill him, it is manslaughter. But it seems that in cases of this kind, the guilt would rather depend upon one or other of these circumstances, either that the act might probably breed danger, or that it was done with a mischievous intent.—1st Russell, 527.

Where sports are unlawful in themselves, or productive of danger, riot, or disorder, so as to endanger the peace, and death ensue in the pursuit of them, the party killing is guilty of manslaughter. Such Death from acts of trespass. manly sports and exercises as tend to give strength, activity, and skill in the use of arms, and are entered into as private recreations amongst friends, are not, however, deemed unlawful sports: but prize fighting, public boxing matches, or any other sports of a similar kind, which are exhibited for lucre, and tend to encourage idleness by drawing together a number of disorderly people, have met with a different consideration. For in these last mentioned cases, the intention of the parties is not innocent in itself, each being careless of what hurt may be given, provided the promised reward or applause be obtained; and meetings of this kind have also a strong tendency in their nature to a breach of the peace. Therefore, where the prisoner had killed his opponent in a boxing match, it was holden that he was guilty of manslaughter; though he had been challenged to fight by his adversary for a public

trial of skill in boxing, and was also urged to engage by taunts; and the occasion was sudden.—Ibid.

Officers of
justice
acting
improperly.

Though officers of justice are authorized to execute their duties in a proper and legal manner, notwithstanding any resistance which may be made to them; yet they should not come to extremities upon every slight interruption, nor unless there be a reasonable necessity. Therefore, where a collector, having distrained for a duty, laid hold of a maid servant who stood at the door to prevent the distress being carried away, and beat her head and back several times against the door-post, of which she died; although the Court held her opposition to the officer to be a sufficient provocation to extenuate the homicide, yet they were clearly of opinion that he was guilty of manslaughter, in so far exceeding the necessity of the case.—1 Russell, 528.

Correction in
foro
domestico.

Moderate and reasonable correction may properly be given by parents, masters, and other persons, having authority in *foro domestico*, to those who are under their care: but if the correction be immoderate or unreasonable, either in the measure of it, or in the instrument made use of for that purpose, it will be either murder or manslaughter, according to the circumstances of the case. If it be done with a dangerous weapon, likely to kill or maim, due regard being always had to the age and strength of the party, it will be murder; but if with a cudgel or other thing not likely to kill, though improper for the purpose of correction, it will be manslaughter. 1st Russell, 532.

Persons
following
their
common
occupations.

Where persons employed about such of their lawful occupations, from whence danger may probably arise to others, neglect the ordinary cautions, it will be manslaughter at least, on account of such negligence. Thus, if workmen throw stones, rubbish, or other things from a house, in the ordinary course of their business, by which a person underneath happens to be killed, if they did not look out and give timely warning to such as might be below, and there was even a small probability of persons passing by, it shall be manslaughter. It was a lawful act, but done in an improper manner. It has indeed been said, that if this be done in the streets of London, or other populous towns, it will be manslaughter, notwithstanding such caution be used. But this must be understood with some limitation. If it be done early in the morning, when few or no people are stirring, and the ordinary caution be used, the party may be excusable: but when the streets are full, such ordinary caution will not suffice; for in the hurry and noise of a crowded street, few people hear the warning, or sufficiently attend to it. 1st Russell, 535.

The punishment of manslaughter was formerly branding, and forfeiture of goods and chattels, but since their abolition in this State, it is ^{Punishment of manslaughter.} punishable by fine and imprisonment.

Murder.—Is the killing any person under the King's peace, with malice aforethought, either express or implied. By stat. 1 Jas. 8, 2d S., 507, it is enacted, "that every person and persons, which, after a month next ensuing the end of this present session of Parliament, shall stab or thrust any person or persons that hath not then any weapon drawn, or that hath not then first stricken the party which all so stab or thrust, so as the person or persons so stabbed or thrust, all thereof die within the space of six months then next following, though it cannot be proved that the same was done of malice aforethought, yet the party so offending, and being thereof convicted by verdict of twelve men, confession or otherwise, according to the laws of this realm, shall be excluded from the benefit of his or their clergy, and suffer death as in case of wilful murder.

1st. OF THE PARTY KILLING.

2d. OF THE PARTY KILLED.

3d. OF THE MEANS OF KILLING.

4th. OF THE MALICE.

5th. OF THE AIDERS, ABETTERS, AND ACCESSARIES.

6th. OF THE PLACE OF TRIAL.

1st. Of the Party Killing.

He must be of sound memory and discretion; for lunatics or infants are incapable of committing any crime, unless in such cases where they show a consciousness of doing wrong, and of course a discretion and discernment between good and evil. 4th B. C., 195.

The person committing the crime must be a free agent, and not subject to actual force at the time the fact is done. Thus if A. by force take the arm of B., in which is a weapon, and therewith kill C., A. is guilty of murder, but not B. But if it be only a moral force put upon him, as by threatening him with duress and imprisonment, or even by assault to the peril of his life, in order to compel him to kill C., it is no legal excuse. If, however, A. procures B., an idiot, or lunatic, to kill C., A. is guilty of the murder as principal, and B. is merely an instrument. So if A. lay a trap or pitfall for B., whereby B. is killed, A. is guilty of the murder as a principal in the first degree, the trap or

pitfall being only the instruments of death. If one persuade another to kill himself, the adviser is guilty of murder; and if the party takes poison himself by the persuasion of another, in the absence of the persuader, yet it is a killing by the persuader; and he is principal in it, though absent at the taking of the poison. And he who kills another upon his desire or command is, in the judgement of the law, as much a murderer as if he had done it merely of his own head. 1 Russell, 423.

Same not
guilty in
certain cases.

On the principle, that it is not murder in the party killing, if he act under the influence of force, certain juries have refused to convict slaves of murder, where the killing was by the command, in the presence, and under fear of the master. And this idea seems to be sustained by the case of the State vs. Slater, sentenced by Judge Wild, 1st Hall's Journal, page 67; and also by the opinion of Judge O'Neill, in the case of the State vs. Crank, 2 Bailey, 76, where it is said, "if a slave be forced by his owners, against his will, to kill another, the slave acting without a will, but by his master's compulsion, would be the bloody instrument of his cruelty, but might be guilty of no legal offence; the master would be guilty of murder.

21. The Party Killed.

Murder may be committed upon any person within the King's peace. Therefore, to kill an alien enemy within the kingdom, unless it be in the heat and actual exercise of war, or to kill a Jew, or outlaw, one attainted of felony, or one in a *præmunire*, is as much murder as to kill the most regular born Englishman. 1st Russell, 424.

Children in
the mother's
womb.

An infant in its mother's womb, not being in *rerum natura*, is not considered as a person who can be killed within the description of murder; and therefore if a woman, being quick or great with child, take any potion to cause an abortion, or if another give her any such potion, or if a person strike her, whereby the child within her is killed, it is not murder nor manslaughter. But by a recent statute, any person wilfully or maliciously administering poison, to cause or procure the miscarriage of any woman, then being quick with child, is guilty of a capital offence; and any persons administering medicines to women not quick with child, with intent to procure miscarriage, is guilty of felony. Where a child, having been born alive, afterwards died by reason of any potions or bruises it received in the womb, it seems always to have been the better opinion, that it was murder in such as administered or gave them. 1st Russell, 424, 6th S. L., 158.

3d. The means of Killing.

The killing may be effected by poisoning, striking, starving, drowning, and a thousand other forms of death by which human nature may be overcome. But there must be some external violence, or corporal damage, to the party; and therefore where a person, either working upon the fancy of another, or by harsh and unkind usage, casts him into such passions of grief or fear that he dies suddenly, or contracts some disease which causes his death, the killing is not such as the law can notice. If a man, however, does an act, the probable consequence of which may be, and eventually is, death, such killing may be murder; although no stroke be struck by himself, and no killing may have been primarily intended: as where a person carried a sick father, against his will, in a severe season, from one town to another, by reason whereof he died; or where a harlot, being delivered of a child, left it in an orchard covered only with leaves, in which condition it was killed by a kite; or where a child was placed in a bog-sye, where it was devoured. In these cases, and also where a child was shifted by parish officers, from parish to parish, till it died for want of care and sustenance, it was considered that the acts so done, wilfully and deliberately, were of malice prepense. 1st Russell, 425.

Forcing a person to do an act which is likely to produce his death, and which does produce it, is murder; and threats may constitute such force. The indictment charged, first, that the prisoner killed his wife by beating; secondly, by throwing her out of the window; and, thirdly and fourthly, that he beat her and threatened to throw her out of the window, and to murder her; and that by such threats she was so terrified, that, through fear of his putting his threats into execution, she threw herself out of the window, and of the beating and bruises received by the fall, died. There was strong evidence that the death of the wife was occasioned by the blows she received before her fall; but Heath, J., Gibbs, J., and Bayley, J., were of opinion, that if her death was occasioned partly by the blows and partly by the fall, yet if she was constrained by her husband's threats to further violence, and from a well grounded apprehension of his doing such further violence as would endanger her life, he was answerable for the consequences of the fall, as much as if he had thrown her out of the window himself: the prisoner, however, was acquitted, the jury being of opinion that the deceased threw herself out of the window from her own intemperance, and not under the influence of the threats.—Ib.

By negligence and harsh usage towards an apprentice.

Upon the same principles, where there is found to be actual malice, or a wilful disposition to injure another, or an obstinate perseverance in doing an act necessarily attended with danger, without regard to the consequences; as if a master, by premeditated negligence, or harsh usage, cause the death of his apprentice, it will be murder. Thus, where the prisoner, upon his apprentice returning to him from Bridewell, whither he had been sent for misbehaviour, in a lousy and distempered condition, did not take that care of him which his situation required, and which he might have done; not having suffered him to be in a bed on account of the vermin, but having made him lie on the boards for some time without covering, and without common medical care; and the death of the apprentice, in the opinion of the medical persons who were examined, was most probably occasioned by his ill treatment in Bridewell, and the want of care when he went home; and the medical persons inclined to think, that if he had been properly treated when he came home, he might have recovered; the Court under these circumstances, and others in favour of the prisoner, left it to the jury to consider, whether the death of the apprentice was occasioned by the ill treatment he received from his master after returning from Bridewell, and whether that ill treatment amounted to evidence of malice; in which case they were to find him guilty of murder. And in a more modern case, a prisoner was found guilty of murder in causing the death of his apprentice, by not providing him with sufficient food and nourishment. The prisoner, Charles Squire, and his wife, were both indicted for the murder of a boy, who was bound as a parish apprentice to the prisoner, Charles; and it appeared upon the trial, that both the prisoners had used the apprentice in a most cruel and barbarous manner, and had not provided him with sufficient food and nourishment; but the surgeon who opened the body, deposed, that in his judgement the boy died from debility, and for want of proper food and nourishment, and not from the wound, &c., which he had received. Lawrence, J., upon this evidence, was of opinion that the case was defective as to the wife, as it was not her duty to provide the apprentice with sufficient food and nourishment, she being the servant of her husband, and so directed the jury, who acquitted her; but the husband was found guilty and executed. 1st Russ., 426.

By savage animals.

If a man has a beast that is used to do mischief, and he, knowing it, suffers it to go abroad, and it kills a man, this has been considered by some as manslaughter in the owner: and it is agreed by all that such a person is guilty of a very gross misdemeanor: and if a man

arposely turn such an animal loose, knowing its nature, it is with us as in the Jewish law) as much murder as if he had incited a bear or dog to worry people; and this, though he did it merely to frighten hem, and make what is called sport. 1 Russ., 427.

It is agreed, that no person shall be adjudged by any act whatever ^{Time of death.} to kill another, who does not die thereof within a year and a day after the stroke received, or cause of death administered, in the computation of which, the whole day upon which the hurt was done is to be reckoned the first. 1st Russ., 428.

Questions may occasionally arise as to the treatment of the wound ^{Treatment of wounds.} or hurt received by the party killed. Upon this subject, it has been ruled, that if a man give another a stroke, not in itself so mortal but that with good care he might be cured, yet if the party die of this wound within the year and day, it is murder, or other species of homicide, as the case may be: though if the wounds or hurts be not mortal, and it shall be made clearly and certainly to appear, that the death of the party was caused by ill applications by himself or those about him, of unwholesome salves or medicines, and not by the wound or hurt, it seems that this is no species of homicide. But when a wound, not in itself mortal, for want of proper applications, or from neglect, turns to a gangrene or a fever, and that gangrene or fever is the immediate cause of the death of the party wounded, the party by whom the wound is given is guilty of murder, or manslaughter, according to the circumstances: for though the fever or gangrene, and not the wound, be the immediate cause of the death, yet the wound being the cause of the gangrene or fever, is the immediate cause of the death, *causa causati*. Thus, it was resolved, that if one gives wounds to another, who neglects the cure of them, or is disorderly and doth not keep that rule which a person wounded should do, yet if he die, it is murder or manslaughter, according to the circumstances; because if the wounds had not been, the man had not died: and therefore, neglect or disorder in the person who received the wounds, shall not excuse the person who gave them.—Ib.

If a man be sick of some disease, which, by the course of nature, ^{Killing a person laboring under disease.} might possibly end his life in half a year, and another gives him a wound or hurt which hastens his death, by irritating and provoking the disease to operate more violently or speedily, this is murder or other homicide, according to the circumstances, in the party by whom such wound or hurt was given: for the person wounded does not die simply *ex visitatione Dei*, but the death is hastened by the hurt which

he received ; and it shall not be permitted to the offender to apportion his own wrong. 1 Russ., 429.

4th. *Of the Malice.*

Malice may be either express or implied.

Malice may be either express or implied by law. Express malice is, when one person kills another with a sedate, deliberate mind, and formed design, such formed design being evidenced by external circumstances discovering the inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. And malice is implied by law from any deliberate, cruel act committed by one person against another person, however sudden: thus where a man kills another suddenly, without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause. So if a man wilfully poisons another; in such a deliberate act the law presumes malice; though no particular enmity can be proved. And where one is killed in consequence of such a wilful act, as shows the person by whom it is committed to be an enemy to all mankind, the law will infer a general malice from such depraved inclination to mischief. And it should be observed as a general rule, that all homicide is presumed to be malicious, and of course amounting to murder, until the contrary appears, from circumstances of alleviation, excuse, or justification; and that is incumbent upon the prisoner, to make out such circumstances to the satisfaction of the Court and jury, unless they arise out of the evidence produced against him. It should also be remarked, that, where the defence rests upon some violent provocation, it will not avail, however grievous such provocation may have been, if it appears that there was an interval of reflection, or a reasonable time for the blood to have cooled before the deadly purpose was effected. And provocation will be no answer to proof of express malice; so that if, upon a provocation received, one party deliberately and advisedly denounce vengeance against the other, as by declaring that he will have his blood, or the like, and afterwards carry his design into execution, he will be guilty of murder; although the death happened so recently after the provocation as that the law might, apart from such evidence of express malice, have imputed the act to unadvised passion. But where fresh provocation intervenes between preconceived malice and the death, it ought clearly to appear that the killing was upon the antecedent malice; for if there be an old quarrel between A. and B., and they are reconciled again, and then, upon a new and sudden

falling out, A. kills B., this is not murder. It is not to be presumed that the parties fought upon the old grudge, unless it appear from the whole circumstances of the fact: but if upon the circumstances, it should appear that the reconciliation was but pretended or counterfeit, and that the hurt done was upon the score of the old malice, then such killing will be murder. Where knowledge of some fact is necessary to make a killing murder, those of a party who have the knowledge, will be guilty of murder, and those who have it not, of manslaughter only. If A. assault B., of malice, and they fight, and A's servant come in aid of his master, and B. be killed, A. is guilty of murder; but the servant, if he knew not of A's malice, is guilty of manslaughter only. 1 Russell, 421.

As to what provocation will be sufficient to reduce the killing to manslaughter, we have already spoken under that head.

5th. Aiders, Abettors, and Accessories.

In order to make an abettor to a murder or manslaughter principal in the felony, he must be present, aiding and abetting the fact committed. The presence, however, need not always be an actual standing by within sight, or hearing of the fact; for there may be a constructive presence, as when one commits a murder, and another keeps watch or guard at some convenient distance. But a person may be present, and, if not aiding and abetting, be neither principal nor accessory: as, if A. happen to be present at a murder, and take no part in it, nor endeavor to prevent it, or to apprehend the murderer, this strange behaviour, though highly criminal, will not of itself render him either principal or accessory. 1st Russell, 431.

If several persons are present at the death of a man, they may be guilty of different degrees of homicide, as one of murder and another of manslaughter; for if there be no malice in the party striking, but malice in an abettor, it will be murder in the latter, though only manslaughter in the former. So that if A. assault B., of malice, and they fight, and A's servant come in aid of his master, and B. be killed, A. is guilty of murder; but the servant, if he knew not of A's malice, is guilty of manslaughter only.—Ibid.

He that counsels, commands, or directs, the killing of any person, and is himself absent at the time of the fact being done, is an accessory to murder before the fact. And though the crime be done by the intervention of a third person, he that procures it to be committed is an accessory before the fact; so that if A. bid his servant hire somebody, no matter whom, to murder B., and furnish him with money for that purpose, and the servant procure C., a person whom A. never

Persons present may be guilty of different degrees of homicide.

Of accessories before the fact.

saw or heard of, to do it, A. is an accessory before the fact. If A. advise B. to kill another, and B. does it in the absence of A., in such case B. is principal, and A. is accessory in the murder. And this holds, even though the party killed be not in *rerum natura* at the time of the advice given: so that if a man advise a woman to kill her child as soon as it shall be born, and she kills it when born in pursuance of such advice, he is an accessory to the murder.—1st Russell, 432.

• Cases where the crime is the direct and immediate effect of the command or counsel of the accessory.

It is a rule, that he who in anywise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act. Thus, if A. commands B. to beat C., and B. beat him, so that he dies, A. being absent, B. is guilty of murder as principal, and A. is accessory; the crime having been committed in the execution of a command which naturally tended to endanger the life of another. And *a fortiori*, therefore, if a man command another to rob any person, and he in robbing him kill him, the person giving such command is as much an accessory to the murder, as to the robbery which was directly commanded: and it is also said, that if one command a man to rob another, and he kill him in the attempt, but do not rob him, the person giving such command is guilty of the murder, because it was the direct and immediate effect of an act done in execution of a command to commit a felony.—Ibid.

Cases where the crime is not the direct and immediate effect of the command or counsel of the person charged as accessory.

But if the crime committed be not the direct and immediate effect of the act done in pursuance of the command, or if the act done varies in substance from that which was commanded, the party giving the command cannot be deemed an accessory to the crime. Thus if A. persuade B. to poison C., and B. accordingly give poison to C., who eats part of it, and gives the rest to D., who is killed by it, A. is guilty of a great misdemeanor only in respect of D., but is not an accessory to his murder; because it was not the direct and immediate effect of the act done in pursuance of the command. And if A. counsel or command B. to beat C. with a small wand or rod, which would not in all human reason cause death, and B. beat C. with a great club, or wound him with a sword, whereof he dies, it seems that A. is not accessory; because there was no command of death, nor of anything that could probably cause death; and B. departed from the command in substance, and not in circumstance. But if the crime committed, be the same in substance with that which was commanded, and vary only in some circumstantial matters; as where a man advises another to kill a person in the night, and he kills him in the day; or to kill him in the field, and he kills him in the town; or to poison him, and he stabs or shoots him; the person giving such command is still acces-

murder: for the substance of the thing commanded was of the party killed, and the manner of its execution is a general circumstance. 1st Russell, 433.

6th. Place of Trial.

Person shall be feloniously struck, wounded, poisoned, or injured, in one district, and die thereof in another, any or indictment thereon, found by jurors of the county or are the death shall happen, whether it be found before the on the sight of such dead body, or before the justices of other justices, or commissioners lawfully authorized to such offences, shall be as good and effectual in the law, as e, wound, poisoning, or other injury had been committed in the same county or district where the party shall die; and or persons guilty of such striking, wounding, poisoning, or y, and every accessory thereto, either before or after the be tried by and before the same court, and (if convicted,) in the same mode, manner and form, as if the deceased had h striking, wounding, or other injury, in the same county where he, she or they, thereof died. 5th S. L., 231.

Which statute it hath been held, that in case of striking of y another, in one parish, and the death occurring in ano- he trial must be before the magistrates of the Parish where curred. State Ex Rel. vs. Toomer, *et al.*, Cheves, 106.

Trials for murder, manslaughter, &c., how to be conducted in certain cases.

HORSE STEALING.

Person who shall be indicted and found guilty of stealing a gelding, colt, filly, mule or ass, shall, for the first offence, less than fifty lashes, nor more than two hundred, to be such times as the judge before whom he may be tried shall r, and also be fined and imprisoned at the discretion of the for the second offence, shall be adjudged and deemed lony, and suffer death without benefit of clergy.

Horse stealing punished by whipping.

or parts of Acts, inconsistent with this Act. are hereby 6th S. L., 413, sec. 1st and 2d.

Person was indicted for horse stealing. It appeared, in evi- he was a hostler to Mr. Tims, inn-keeper at the Ten Mile l that in the night time, he went off, and took with him the n behalf of the prisoner it was contended, that this was only

If a hostler who has the care and charge of a horse, take him with an intent to

convert him to his own use, it is felony. Otherwise, if he only take him to use him, and then return him again, in the latter case, it is only a breach of trust.

a breach of trust, and not a felony; because he had the care and charge of the horse, and by this means gained a possession by the consent of the owner; consequently, there could be no felony committed, as he came legally and fairly into the prisoner's custody. *State vs. Self*, 1st Bay, 242.

THE COURT.—The *intention* of the prisoner in taking the horse, is a matter for the consideration of the jury; whether it was done *animo furandi*, or not. As to the law, it is clear that the bare charge or care of a horse, does not change the legal possession out of the master. If the prisoner took him away with intent to steal or convert him to his own use, it is felony, notwithstanding he had the care of him as hostler. But it is only a breach of trust, if he take him to use him, and then return him again.—*Ibid*.

So also, where the party gets possession with a felonious intent, by delivery from the owner or his agent.

Larceny may be committed of goods obtained from the owner by delivery, if it be done *animo furandi*. *State vs. Gorman*, 2 N. & Mc., 90.

HOUSE BREAKING.

Any person convicted of robbing a dwelling house, wherein there is any or no person, &c., or standing mute, shall lose his clergy.

All and every person or persons that shall, at any time, from and after the first day of March, in the year of our Lord, 1691, rob any other person, or shall feloniously take away any goods or chattels, being in any dwelling house, the owner or any other person being therein, and put in fear, or shall rob any dwelling house in the day time, any person being therein, or shall comfort, aid, abet, assist, counsel, hire, or command any person or persons to commit any of the said offences, or to break any dwelling-house, shop, or ware-house, thereunto belonging, or therewith used, in the day time, and feloniously take away any money, goods or chattels, of the value of five shillings or upwards, therein being, although no person shall be within such dwelling-house, shop, or warehouse; or shall counsel, hire, or command any person to commit any burglary, being thereof convicted or attainted, or being indicted thereof, shall stand mute, or will not directly answer to the indictment, or shall peremptorily challenge above the number of twenty persons returned to be of the jury, shall not have the benefit of his or their clergy. 2d S. L., 531, sec. 1st.

as, of late years, divers lewd and felonious persons, under-
 at the penalty of the robbing of houses in the day time (no
 ng in the house at the time of the robbery) is not so penal
 nit or do a robbery in any house, any person being therein
 e of the robbery; which hath and doth embolden divers
 ns to watch their opportunity and time to commit, and do
 ous robberies, in breaking and entering divers honest per-
 s, and especially of the poorer sort of people, who by rea-
 t poverty, are not able to keep any servant, or otherwise to
 body to look to their house, when they go abroad to hear
 vice, or from home to follow their labor to get their living,
 to the hinderance and loss of good subjects, and the utter
 ing of many poor widows, sole women, and other people.
 erefore enacted, That if any person or persons, after the
 s present session of parliament, shall be found guilty, and
 by verdict, confession or otherwise, according to the laws
 lm, for the felonious taking away, after the Feast of Easter
 ensuing, in the day time, of any money, goods or chattels,
 e value of 5s. or upwards, in any dwelling house, or houses,
 t thereof, or any out-house or out-houses belonging and
 d with any dwelling-house or houses, although no person
 the said house or out-houses at the time of such felony
 ; then such person and persons shall not be admitted to the
 his or their clergy, but shall be utterly excluded thereof.
 505, sec. 1 and 2.

ns which may arise under these statutes, as to what is a
 ouse, must be decided by the rules laid down under the
 ury. We refer to the same head as to the reward for
 a house breaker.

An Act, that
 no person
 robbing any
 house in the
 day time,
 although no
 person be
 therein, shall
 be admitted
 to have the
 benefit of his
 clergy.

He shall not
 have his
 clergy, that
 robbeth a
 house in the
 day time, of
 the value of
 5s.

HUE AND CRY,

old common law process of pursuing, with horn and with
 felons, and such as have dangerously wounded another.' We
 e the Statute 27 Elizabeth, c. 9, relating to hue and cry,
 ute is of force in this State, though wholly inapplicable and

An Act for the following of Hue and Cry.

Hue and cry,
how and by
whom to be
made, and
the penalty,
etc.

The effect of
statutes,
touching
answering
for robbery.

Several
inconven-
iences ensu-
ing the
aforesaid
statutes,
touching hue
and cry.

Whereas, by two ancient statutes, the first made in the past holden at Winchester, in the 13th year of the reign of King E the 1st, and the other in the 28th year of the reign of King E the 3d, it was, for the better repressing of robberies and fe (amongst other things) enacted to this effect, that if the cou not answer for the bodies of such malefactors, that then th should be such, that is, to wit, that the people dwelling in the c shall be answerable for the robberies done, and the damages, the whole hundred, where the robbery shall be done, with th chises which are within the precinct of the same hundred, answer the robberies done; and if the robbery chance to be d the division of two hundreds, that then both the hundreds an with the franchises within the precinct of them, shall be answe as in the said two several statutes it doth more at large appea S. L., 501.

Forasmuch as the said parts of the said several statutes of late days more commonly put in execution, than heretofor have been, are found, by experience, to be very hard and e to many of the Queen's majesty's good subjects, because by the statutes they do remain charged with the penalties therein con notwithstanding their inability to satisfy the same, and though t as much as in reason might be required, in pursuing such male and offenders, whereby both large scope of negligence is given inhabitants and residents in other hundreds and counties, not t ecute the hue and cry made, followed, and brought unto the reason they are not chargeable for any portion of the goods r nor with any damages in that behalf given; and also great enco ment and emboldening is likewise given unto the offenders, to c daily more felonies and robberies, as seeing it in manner imp for the inhabitants and residents of the said hundred and fras wherever the robbery is committed, to apprehend them witho aid of the other hundreds and counties adjoining; and for that al party robbed having remedy by the aforesaid statutes, for the re ing of his goods robbed, and damages, against the inhabitan residents of the hundred wherein the robbery was committed, is times. negligent and careless in prosecuting and pursuing th malefactors and offenders: our sovereign lady, the Queen's m not willing, therefore, that her people should be impoverished l such pain or penalty which should be hard or grievous to the having special regard to abate the power of felons, and to r

lonies, doth for remedy hereof, that the inhabitants and residents of every or any such hundred, (with the franchises within the precinct thereof) wherein negligence, fault or defect of pursuit, and fresh suit, after hue and cry made, shall happen to be, from and after forty days next, after the end of this present session of parliament, shall answer and satisfy the one moiety, or half of all and every such sum and sums of money and damages, as shall by force or virtue of the said statutes, or either of them, be recovered or had against or of the said hundred, with the franchise therein, in which any robbery or felony shall at any time hereafter be committed or done: and that the same moiety shall and may be recovered by action of debt, bill, plaint, or information, in any of the Queen's Majesty's Courts of record at Westminster, by and in the name of the clerk of the Peace for the time being, of or in every such county within this realm, where any such robbery and recovery by the party or parties robbed shall be, without naming the christian name or surname of the said clerk of the Peace; which moiety so recovered shall be to the only use and behoof of the inhabitants of the said hundred, where any such robbery or felony shall be committed or done.—Ib.

Inhabitants of the hundred, where fresh suit shall not be made, shall answer half damages.

The moiety shall be recovered by the clerk of the peace.

If any clerk of the Peace, of or in any county within this realm, shall at any time hereafter commence or prefer any such suit, action or information, and shall, after the same so sued, commenced or referred, happen to die or be removed out of his office, before recovery and execution had, that yet no such action, suit, bill, plaint or information, sued, commenced or preferred, shall, by such displacing or death, be abated, discontinued or ended; but that it shall and may be lawful to and for the clerk of the Peace next succeeding in the said county, to prosecute, pursue, and follow all and every such action, bill, plaint, suit and information, for the causes aforesaid, in such manner and form, and to all intents and purposes, as that clerk of the Peace might have done which first commenced or preferred the said suit, bill, plaint or information.—Ib.

The death or removing of the clerk of the peace shall not cease the suit.

And although the whole hundred, where such robberies and felonies are committed, with the liberties within the precinct thereof, be by the said two former statutes charged with the answering to the party robbed his damages, yet, nevertheless, the recovery and execution by and for the party or parties robbed, is had against one, or a very few persons of the said inhabitants, and he and they so charged, have not heretofore by law had any mean or way to have any contribution of or from the residue of the said hundred, where

the said robbery is committed, to the great impoverishment of them against whom such recovery or execution is had.—Ib.

A remedy for those against whom recovery and execution is had, to have contribution.

The taxation of the towns by the justices.

For remedy whereof, be it enacted, that after execution of damages, by the party or parties, had, it shall and may be lawful (upon complaint made by the party or parties so charged) to and for two justices of the peace (whereof one to be of the quorum) of the same county inhabiting within the said hundred, or near unto the same, where any such execution shall be had, to assess and tax rateably and proportionably, according to their discretions, all and every the towns, parishes, villages and hamlets, as well of the said hundred, where any such robbery shall be committed, as of the liberties within the said hundred, to and towards an equal contribution to be had and made for the relief of the said inhabitant or inhabitants, against whom the party or parties robbed before that time had his or their execution; and that after such taxation made, the constables, constable, head-boroughs or head-borough of every such town, parish, village and hamlet, shall, by virtue of this present Act, have full power and authority within their several limits, rateably and proportionably, to tax and assess according to their abilities, every inhabitant and dweller in every such town, parish, village and hamlet, for and towards the payment of such taxation and assessment, as shall be so made upon every such town, parish, village and hamlet as aforesaid, by the said justices; and that if any inhabitant of any such town, parish, village or hamlet, shall obstinately refuse and deny to pay the said taxation and assessment, so by the said constables, constable, head-boroughs or head-borough taxed and assessed, that then it shall and may be lawful to and for the said constables and head-boroughs, and every of them, within their several limits and jurisdictions, to distrain all and every person and persons, so refusing and denying, by his and their goods and chattels; and the same distress to sell, and the money thereof coming to retain to the use aforesaid; and if the goods or chattels so distrained and sold shall be of more value than the said taxation shall come unto, that then the residue of the said money, over and above the said taxation, shall be delivered unto the said person or persons so distrained.—Ib.

Distraining, and sale of distress, for default of payment.

Constables shall deliver the money collected to the justices.

And all and every the said constables and head-boroughs, after that they have within their several limits and jurisdictions, levied and collected their said rates and sums of money so taxed, shall, within ten days after such collection, pay and deliver the same over unto the said justices of peace, or one of them, to the use and behoof of the said inhabitant or inhabitants for whom such rate, taxation and assess-

it shall be made and had as aforesaid; which money, so paid, shall be justices or justice, so receiving the same, be delivered over on request made) unto the said inhabitant or inhabitants, to whose the same was collected.—Ibid.

And the like taxation, assessment, levying by distress and payment as aforesaid, shall be had and done within every hundred where fault or negligence of pursuit and fresh suit shall be; for and to the rest of all and every inhabitant and inhabitants of the same hundred, where such default shall be, that shall at any time hereafter, by two of this present act, have any damages of money levied of them, or to the payment of the one moiety, or half of the money recovered against the said hundred, where any robbery shall be hereafter committed.—Ibid.

Levying of the contribution in the hundred where default of pursuit shall be.

Provided, That where any robbery is or shall be hereafter committed by two or a greater number of malefactors, and that it happen to one of the said offenders to be apprehended by pursuit, to be made according to the said former mentioned laws and statutes, or according to this present Act, that then, and in such case, no hundred or achise shall in any wise incur or fall into the penalty, loss, or forfeiture mentioned, either in this present Act, or in any of the said former statutes, although the residue of the said malefactors shall happen to escape, and not be apprehended; any thing in this statute, or in the said former statutes to the contrary notwithstanding.—Ibid.

No penalty where any of the offenders be taken.

Provided also, That no person or persons hereafter robbed, shall receive any benefit by virtue of any of the said former statutes, to charge the hundred where any such robbery shall be committed, except he or they so robbed, shall commence his or their suit or action within one year next after such robbery so to be committed.—Ibid.

The suit shall be commenced within one year after the robbery.

No hue and cry, or pursuit hereafter to be done or made by the country, or inhabitants of any hundred, shall be allowed and taken to be a lawful hue and cry or pursuit upon or after any the said persons or offenders, except the same hue and cry or pursuit be done and made by horsemen and footmen; any usage or custom to the contrary notwithstanding.—Ibid.

In what sort hue and cry and pursuit of felons shall be made.

No person or persons that shall hereafter happen to be robbed, shall sue or maintain any action, or take any benefit by virtue of the said former mentioned statutes, or either of them, except the same person or persons, so robbed, shall, with as much convenient speed as may be, give notice and intelligence of the said felony or robbery so committed, to some of the inhabitants of some town, village, or hamlet, near to the place where any such robbery shall be committed; nor shall

The party robbed shall give notice thereof to the inhabitants of some town, etc.

The party
robbed
examined
before a
justice,
whether he
knew any of
the offenders.

bring or have any action upon and by virtue of any of the statutes aforesaid, except he or they shall first, within twenty days next, before such action to be brought, be examined upon his or their corporal oath, to be taken before some one justice of the peace of the county where the robbery was committed, inhabiting within the said hundred where the robbery was committed, or near unto the same, whether he or they do know the parties that committed the said robbery, or any of them; and if upon such examination it be confessed that he or they do know the parties that committed the said robbery, or any of them, that then he or they so confessing, shall, before the said action be commenced or brought, enter into sufficient bond, by recognizance, before the said justice before whom the said examination is had, effectually to prosecute the same person and persons so known to have committed the said robbery, by indictment or otherwise, according to the due course of the laws of this realm.—Ibid.

I N F A N T .

By an infant is meant any one, whether male or female, who is under the age of twenty-one years.

1st. WHEN AND FOR WHAT CRIMES THEY MAY BE PUNISHED.

2d. OF THE LIABILITY OF INFANTS ON CONTRACTS FOR NECES-
SARIES, AND OTHER CONTRACTS.

3d. HOW AN INFANT MAY SUE OR BE SUED.

4th. OF THE LIABILITY OF AN INFANT FOR TORTS.

5th. OF THE PRIVILEGES AND DISABILITIES OF INFANTS.

1st. *When they may be Punished, &c.*

Infants
committing
misdemean-
ours.

The full age of man or woman, by the law of England, is twenty-one years: under which age, a person is termed an infant, and is exempted from punishment in some cases of misdemeanors and offences that are not capital. But the nature of the offence will make differences which should be observed. Thus, if it be any notorious breach of the peace, as a riot, battery, or the like, an infant above the age of fourteen is equally as liable to suffer as a person of the full age of twenty-one; and if an infant judicially perjure himself in point of age, or otherwise, he shall be punished for the perjury; and he may be indicted for cheating with false dice, &c.; but if the offence charged by the indictment be a mere *non-feasance*, (unless it be of

in a thing as the party be bound to by reason of tenure or the like, to repair a bridge, &c.,) there, in some cases, he shall be privileged by his non-age, if under twenty-one, though above fourteen years; cause *laches*, in such a case, shall not be imputed to him. 1 Russ. 2. It is said that if an infant of the age of eighteen years be convicted of a *disseisin* with force, yet he shall not be imprisoned; and the law is said to be, that though an infant at the age of eighteen or even fourteen, by his own acts may be guilty of a forcible entry, and may be punished for the same, yet he cannot be imprisoned, because his infancy is an excuse by reason of his indiscretion; and it is not particularly mentioned in the statute against forcible entries, that he shall be committed to such fine. An infant cannot, however, be guilty of a forcible entry or *disseisin* by barely commanding one, or by assenting to one to do so; because every command or assent of this kind by a person under such incapacity, is void: but an actual entry by an infant into another's freehold gains the possession, and makes him a *disseisor*. *id.*

With regard to capital crimes, the law is more minute and circumstanced; distinguishing with greater nicety the several degrees of age and discretion: though the capacity of doing ill or contracting guilt is not so much measured by years and days, as by the strength of the delinquent's understanding and judgement. But within the age of seven years, an infant cannot be punished for any capital offence, whatever circumstances of a mischievous discretion may appear; for *presumptio juris*, such an infant cannot have discretion; and against this presumption, no averment shall be admitted. On the attainment of fourteen years of age, the criminal actions of infants are subject to the same modes of construction as those of the rest of society; for the law presumes them at those years to be *doli capaces*, and able to discern between good and evil, and therefore subjects them to capital punishment as much as if they were of full age. But during the interval between fourteen years and seven, an infant shall be *prima facie* deemed to be *doli incapax*, and presumed to be unacquainted with guilt; yet this presumption will diminish with the advance of the tender's years, and will depend upon the particular facts and circumstances of his case. The evidence of malice, however, which is to supply age, should be strong and clear beyond all doubt and contradiction: but if it appear to the Court and jury that the offender was *doli capaz*, and could discern between good and evil, he may be convicted and suffer death. Thus, it is said, that an infant of eight years may be guilty of murder, and shall be hanged for it; and where an

Infants committing capital crimes. &c.

infant between eight and nine years old was indicted and found guilty of burning two barns, and it appear upon examination that he had malice, revenge, craft and cunning, he had judgement to be hanged, and was executed accordingly.—Ibid, 3.

An infant of the age of nine years, having killed an infant of the like age, confessed the felony; and upon examination, it was found that he had hid the blood and the body. The justices held that he ought to be hanged; but they respited the execution that he might have a pardon. Another infant, of the age of ten years, who had killed his companion and hid himself, was, however, actually hanged; upon the ground that it appeared by his hiding that he could discern between good and evil; and *malitia supplet aetatem*. And a girl of thirteen was burnt, for killing her mistress.—Ibid.

In the case of rape, the law presumes that an infant under the age of fourteen years is unable to commit the crime; and therefore it seems he cannot be guilty of it; but this is upon the ground of impotency rather than the want of discretion; for he may be a principal in the second degree, as aiding and assisting in this offence as well as in other felonies, if it appear by sufficient circumstances that he had a mischievous discretion.—Ibid.

The following is an important case, as to the capability of an infant of ten years old being guilty of the crime of murder; and as to the expediency of visiting such an offender with capital punishment.

Case of
murder by a
boy of ten
years old.

At Bury Summer Assizes, 1748, William York, a boy of ten years of age, was convicted before Lord Chief Justice Willes, for the murder of a girl of about five years of age, and received sentence of death; but the Chief Justice, out of regard to the tender years of the prisoner, respited execution until he should have an opportunity of taking the opinion of the rest of the judges, whether it was proper to execute him or not, upon the special circumstances of the case; which he reported to the judges at Sergeant's Inn, in Michaelmas Term following. The boy and girl were parish children, put under the care of a parishoner, at whose house they were lodged and maintained. On the day the murder happened, the man of the house and his wife went out to their work early in the morning, and left the children in bed together. When they returned from work, the girl was missing, and the boy being asked what was become of her, answered that he had helped her up and put on her clothes, and that she was gone he knew not whither. Upon this, strict search was made in the ditches and pools of water near the house, from an apprehension that the child might have fallen into the water. During this search, the man under whose care the

children were, observed that a heap of dung near the house had been newly turned up; and, upon removing the upper part of the heap, he found the body of the child about a foot's depth under the surface, cut and mangled in a most barbarous and horrid manner. Upon this discovery, the boy, who was the only person capable of committing the act, that was left at home with the child, was charged with the fact, which he stiffly denied. When the coroner's jury met, the boy was again charged, but persisted still to deny the fact; at length, being closely interrogated, he fell to crying, and said he would tell the whole truth. He then said, that the child had been used to foul herself in bed; that she did so that morning, (which was not true, for the bed was searched and found to be clean,) that thereupon he took her out of the bed and carried her to the dung heap, and with a large knife, which he found about the house, cut her in the manner the body appeared to be mangled, and buried her in the dung heap; placing dung and straw that was bloody under the body, and covering it with what was clean; and having so done, he got water and washed himself as clean as he could. The boy was the next morning carried before a neighboring justice of the peace, before whom he repeated his confession, with all the circumstances he had related to the coroner and his jury. The justice of the peace very prudently deferred proceeding to a commitment, until the boy should have an opportunity of recollecting himself. Accordingly, he warned him of the danger he was in, if he should be thought guilty of the fact he stood charged with, and admonished him not to wrong himself; and then ordered him into a room, where none of the crowd that attended should have access to him. When the boy had been some hours in this room, where victuals and drink were provided for him, he was brought a second time before the justice, and then he repeated his former confession; upon which he was committed to jail. On the trial, evidence was given of the declarations before mentioned to have been made before the coroner and his jury, and before the justice of the peace, and of many declarations to the same purpose, which the boy made to other people after he came to jail, and even down to the day of his trial; for he constantly told the same story in substance, commonly saying that the devil put him upon committing the fact. Upon this evidence, with some other circumstances tending to corroborate the confessions, he was convicted. Upon this report of the chief justice, the judges, having taken time to consider of it, unanimously agreed, that the declarations stated in the report were evidence proper

to be left to the jury; 2d, that supposing the boy to have been guilty of this fact, there were so many circumstances stated in the report, which were undoubtedly tokens of what Lord Hale calls a mischievous discretion, that he was certainly a proper subject for capital punishment, and ought to suffer; for it would be of very dangerous consequence to have it thought that children may commit such atrocious crimes with impunity. 1st Russ., 4.

That there are many crimes of the most heinous nature, such as (in the present case) the murder of young children, poisoning parents or masters, burning houses, &c., which children are very capable of committing, and which they may in some circumstances be under strong temptations to commit; and, therefore, though the taking away the life of a boy of ten years old might savor of cruelty, yet, as the example of that boy's punishment might be a means of deterring other children from the like offences, and as the sparing the boy, merely on account of his age, might probably have quite a contrary tendency, in justice to the public, the law ought to take its course, unless there remained any doubt touching his guilt. In this general principle, all the judges concurred: but two or three of them, out of great tenderness and caution, advised the chief justice to send another reprieve for the prisoner, suggesting that it might possibly appear, on further inquiry, that the boy had taken this matter upon himself at the instigation of some person or other, who hoped by this artifice to screen the real offender from justice. Accordingly, the chief justice granted one or two more reprieves, and desired the justice of the peace who took the boy's examination, and also some other persons, in whose prudence he could confide, to make the strictest inquiry they could into the affair, and report to him. At length he, receiving no further light, determined to send no more reprieves, and to leave the prisoner to the justice of the law at the expiration of the last; but before the expiration of that reprieve, execution was respited till further order, by warrant from one of the secretaries of State; and at the summer assizes, 1757, the prisoner had the benefit of His Majesty's pardon, upon condition of his entering into the sea service.—1b.

How far
statutes
extend to
cases of
infancy.

It is said, that an act making a new felony, does not extend to an infant under the age of discretion, namely, fourteen years old; and that general statutes which give corporal punishment, are not to extend to infants. But this must be understood, where the corporal punishment is, as it were, but collateral to the offence, and not the direct intention of the proceeding against the infant for his misde-

minor; in many cases of which kind the infant under the age of twenty-one shall be spared, though possibly the punishment be enacted by parliament. Ibid, 5.

1. Of the Liability of Infants on Contracts for Necessaries, and other Contracts.

For Necessaries.—As to contracts for necessaries, made by infants, it is to be observed, that (strictly speaking) all contracts made by infants are either void or voidable; because a contract is the act of free understanding, which, during their state of infancy, they are presumed to want; yet civil societies have so far supplied that defect, and taken care of them, as to allow them to contract for their benefit and advantage, with power, in most cases, to recede from and vacate when it may prove prejudicial to them; but in this contract for necessaries they are absolutely bound, and this likewise is in benignity to infants; for if they were not allowed to bind themselves for necessaries, nobody would trust them, in which case they would be in worse circumstances than persons of full age. Therefore, it is early agreed, that an infant may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessaries, and likewise for his good teaching and instruction, whereby he may profit himself afterwards. This binding means by parol; in fact, for necessaries, if there is not an actual promise, the law implies a promise, and the infant will not be bound by any bond, note, or bill, which he gives, though for necessaries; therefore a tradesman's best security will be the actual or implied promise. With respect to schooling, &c., it must be in cases where the credit was given, *bona fide*, to the infant. But where an infant is *sub potestate parentis*, and living in a house with his parents, he shall not then be liable even for necessaries. 2d Tomlins, 183.

It must appear that the things were actually necessary, and of reasonable prices, and suitable to the infant's degree and estate, which regularly must be left to the jury; but if the jury find that the things are necessaries, and of reasonable price, it shall be presumed they find evidence for what they thus find; and they need not find particularly that the necessaries were, nor of what price each thing was; also, the plaintiff declares for other things as well as necessaries, or alleges too high a price for those things that are necessaries, a jury may consider of those things that were really necessary, and of their

intrinsic value, and proportion their damages accordingly.—*Ib.*

If an infant promises another, that if he will find him meat, drink, and washing, and pay for his schooling, that he will pay £7 yearly, an action upon the case lies upon this promise; for learning is as necessary as other things; and though it is not mentioned what learning this was, yet it shall be intended what was fit for him, till it be shown to the contrary on the other part; and though he to whom the promise was made does not instruct him, but pays another for it, the promise of re-payment thereof is good, if it appears that the learning, meat, drink, and washing, could not be afforded for a less sum than £7. *Ibid.*

If an infant be a mercer, and hath a shop in a town, and there buys and sells, and contracts to pay a certain sum to J. S., for wares sold to him by J. S., to resell, yet he is not chargeable upon this contract, for this trading is not immediately necessary *ad victum et vestitum*; and if this were allowed, infants might be infinitely prejudiced, and buy and sell, and live by the loss.—*Ib.*

And as the contract of an infant for wares, for the necessary carrying on his trade, whereby he subsists, shall not bind him, so neither shall he be liable for money which he borrows to lay out for necessities; therefore, the lender must, at his peril, lay it out for him, or see that it is laid out in necessities. So that if one lends money to an infant, who actually lays it out in necessities, yet this will not bind the infant, nor subject him to an action; for it is upon the lending that the contract must arise, and after that time there could be no contract raised to bind the infant, because after that he might waste the money, and the infant's applying it afterwards for necessities will not, by matter *ex post facto*, entitle the plaintiff to an action. *Ib.*, 184.

Although an infant shall be liable for his necessities, yet if he enters into an obligation with a penalty for payment thereof, this shall not bind him, for the entering into a penalty can be of no advantage to the infant. But a bond or single bill for the exact amount of necessities furnished, will be valid.—*Ib.*

If an infant becomes indebted for necessities, and the party takes a bond from the infant, this shall not drown the simple contract, because the bond has no force. Necessaries for an infant's wife are necessities for him: but if provided only in order for the marriage,

is not chargeable, though she use them after. An infant shall be able for the nursing his child.—Ib.

What are necessaries for an infant, is a question of law for the court. How much, and of what quality, must depend upon the infant's pecuniary circumstances, and of these, the jury are to judge. *4 M'C. 572.*

Lodging, clothing, food, medicine and education, are necessaries every infant; such articles, therefore, as come under such heads, must be allowed; but liquor, pistols, powder, saddles, whips, bridles, files, fiddle strings, &c., are not to be allowed.—Ibid.

If a contract be made by an infant and an adult, they cannot both sue thereon, but the action should be brought against the adult only. *3d Mc., 6.*

An infant who lives with, and is properly maintained by her parents, cannot bind herself to a stranger for necessaries; and where daughters live with their mother, it should be presumed that they were properly maintained by their parent until the contrary be proved: for the mother being the best judge of what is necessary for them, should be consulted before credit be given them.—Ibid.

Other Contracts.—As to acts *in pais*, infants are regularly allowed to second and break through all contracts *in pais*, made during minority, except only for schooling and necessaries, be they never so much to their advantage; and the reason hereof is, the indulgence the law has thought fit to give infants who are supposed to want judgement and discretion in their contracts and transactions with others, and the care it takes of them in preventing their being imposed upon, or overreached by persons of more years and experience. *2d Tomlins, 185.*

And for the better security and protection of infants herein, the law has made some of their contracts absolutely void: i. e., all such in which there is no apparent benefit, or semblance of benefit to the infant; but as to those from which the infant may receive benefit, and which were entered into with more solemnity, they are only voidable; that is, the law allows them when they come of age, and are capable of considering over again what they have done, either to ratify and firm such contracts, or to break through and avoid them.—Ibid.

If an infant draws a bill of exchange, yet he shall not be liable on the custom of merchant, but he may plead infancy in the same manner that he may to any other contract of his.—Ibid.

But a person is liable on a bill of exchange, accepted after he was of age, though drawn while he was an infant.—Ibid.

Though a promise by an infant will not bind him unless for necessities, yet he shall take advantage of any promise made to him, though the consideration were his promise, when an infant. And an infant plaintiff has been allowed to recover on mutual promises of marriage. Ibid.

The trading contract of an infant is not void; but he may enforce it at his election.—Ibid.

Contracts with infants are void or voidable. Those which are voidable only impose a qualified obligation, and if the infant, after coming of age, elect to perform, it will be enforced against him. 4th McC. 241.

A very slight circumstance shewing his assent to the contract, after the infant comes of age, will confirm the contract.—Ibid.

If he purchases land, and continue in possession after he comes of age; and if he buys a horse, which he retains and uses, after he becomes twenty-one, it will amount to a confirmation.—Ibid.

Where an infant gave his note for a horse, payable to A. or bearer, and kept the horse after he became twenty-one, and sold him, it was held a confirmation, and that the bearer of the note, to whom it had been transferred, might recover it.—Ibid.

A sale to an infant, by a person of full age, divests the title of the latter; nor will his retaining, or afterwards coming into possession of the property, as guardian of the infant, authorize him to rescind the sale. 1st Bailey, 320.

The property of a defendant, who has come of age, may be levied on whilst it remains in the possession of his guardian: if the latter has any claims upon the property, for advances to his ward, his remedy is in Equity.—Ibid.

An infant partner, confirming the contract of partnership after coming of age, subjects himself to all the liabilities of the firm incurred during his minority: and where an infant partner, after attaining full age, transacted the business of the firm, received their monies and paid their debts: held, that these acts, unexplained, amounted to a confirmation of the partnership, and made him liable for a debt of the firm contracted during his infancy, although he was ignorant of the existence of the debt at the time of such confirmation, and had, on being informed of it, refused to pay it. 2d Hill, 479.

3d. How an Infant may Sue and be Sued.

An infant cannot be sued but under the protection, and joining the name of his guardian; for he is to defend him against all attacks as

by law as otherwise; but he may sue either by his guardian, or *prochein amy*, his next friend, who is not his guardian. This *prochein amy* may be any person who will undertake the infant's cause: and it only happens that an infant, by his *prochein amy*, institutes a suit against a fraudulent guardian. 2d Tomlins, 185.

An infant is to prosecute a suit by his guardian or best friend, though the term used is *prochein amy*, i. e., next friend; but he cannot defend by such next friend, but must defend only by a guardian, as the law supposes that when he demands or sues for any thing, it is for his benefit. The power for infants to sue by *prochein amy*, first introduced by the statute Westm. 2.—Ibid.

An infant be joined with others, in suing in the right of another, a declaration may be brought by attorney, for they all make but one party in law.—Ibid.

The plaintiff's attorney should apply to the defendant to name a guardian; and if he does not, in six days, the plaintiff may apply to the Court, who will oblige him to do it.—Ibid.

Not only but a solvent person should be admitted *prochein amy* to prosecute the action of an infant plaintiff; but the Court of Appeals will not rescind the appointment of a *prochein amy*, whose solvency is doubtful: for the person admitted may be removed, at any stage of the suit, on proof of his insolvency, and another substituted, unless security is given for the payment of costs. 1st Bailey, 123.

Before pleading to the merits, in an action brought by an infant, the defendant declares by guardian, the defendant cannot require proof at issue, that the guardian had been duly admitted. 2d Bailey,

A plea to the merits is an admission of the plaintiff's right to sue in the character in which he declares. The objection goes to his disability, and cannot be taken advantage of but by plea in abatement. *Secus*, where he declares in his own right, and the character in which he claims makes part of his title to the thing for which he sues.—Ibid.

Who prosecutes a suit for an infant, as guardian, is concluded by recovery from afterwards claiming the subject-matter of the suit, in his own right against the same defendant; and therefore, after the disability of the defendant to the infant has been established, evidence of prior right, in the guardian, is irrelevant, and inadmissible.—

If an infant sue without *prochein amy*, and the defendant plead issuably, he waives the objection of form. The objection of infancy in the plaintiff, can only be made by plea in abatement. 1 Spear, 212.

Where the proof of infancy in the plaintiff comes from the defendant under the general issue, the Court cannot *in invitum* order a non-suit on this proof.—Ibid.

The case of *McDaniel vs. Nicholson*, 2 Mills' Const. Rep., 344, examined, and held not a case of authority for what it purports to decide.—Ibid.

A judgement irregularly obtained against an infant, may be set aside after he has attained full age, on motion and rule; and the fact of infancy must be tried *per pais*, and not by inspection. 2 Rich., 324.

A judgement against an infant, who has not appeared by guardian, is erroneous.—Ibid.

The Court is not bound, after the infant has attained full age, to set aside such a judgement, on the mere fact that he was an infant when it was obtained, but may consider lapse of time, the conduct of the defendant, and other circumstances, as having confirmed the judgement, or rendered the interference of the Court improper; *semble*.—Ibid.

The proper practice in such cases, seems to be, on affidavit of the defendant's infancy, to order a rule to shew cause, on the return of which the judgement may be set aside, or an issue made up to try the fact of infancy, or such other material fact as the case may present. Ibid.

4th. Of an Infant's Liability for Torts.

An infant is liable in respect of torts committed by him, as for slander or battery; and in detinue for goods delivered to him for a particular purpose, and which he has failed to return. 2d Tomlins, 186.

But a plaintiff cannot convert an action founded on a contract into a tort, so as to charge an infant defendant: therefore, where the plaintiff declared at defendant's request he had delivered a mare to defendant, to be moderately ridden, and that defendant maliciously, &c., rode the said mare so that she was damaged, &c., the Court of K. B. held, that defendant might plead his infancy in bar, the action being founded on a contract.—Ibid.

An infant at the age of discretion, is liable in an action on the case,

for the embezzlement of goods entrusted to his care. 4th M'Cord, 387.

An infant is not bound by a submission to an award, and a note given by him, in pursuance of an award, is void, though the matter submitted was a tort committed by the infant.

An infant is liable for torts, but it does not follow that his contracts in compensation for torts are valid. 3d M'C., 257.

5th. Of the Disabilities and Privileges of Infants.

An infant, it seems, is capable of such offices as do not concern the administration of justice, but only require skill and diligence; and then he may either exercise them himself when of the age of discretion, or they may be exercised by deputy; such as the office of jailor, &c.

An infant cannot be a juror. 2d Tomlins, 180.

No executor or executrix shall take upon himself or herself the administration of any will or devise, unless he or she be of the full age of twenty-one years. 6th S. L., 237, sec. 2.

An infant has five full years after his title to land accrues, within which to bring his action, notwithstanding the statute of limitations had commenced to run in the time of the ancestor, under whom he claimed by descent. *Rose vs. Daniel*, 2 Tr. Con. Rep., 540.

Minors (by the Act of 1788) have five years after their coming of age, to prosecute their claims, if to land, and four years if to personal property; and it is the same, whether at the time of their coming of age, they were within or without the State.

If the plaintiff commence his action for the recovery of land, within the five years, and such action be non-suited, discontinued, or in any other way be let fall, he, or any one claiming under him, may, yet nevertheless, within two years of such non-suit, &c., commence his second action for the recovery of such lands, and it will not be barred by the statute. 1st M'Cord, 555.

INN KEEPERS.

1st. OF THEIR LIABILITIES.

2d. THEIR CHARGES.

3d. THEIR REMEDIES FOR THEIR BILLS.

1st. Of their Liabilities.

It seems to be clear, that if one who keeps a common inn refuse either to receive a traveller, or a guest, into his house, or to find him victuals or lodging, upon his tendering him a reasonable price for the same, he is not only liable to render damages to the party in an action, but may also be indicted and fined at the suit of the king; and it is also said, that he may be compelled by the constable of the town to receive and entertain such person as his guest; and that is no way material whether he have any sign before his door or not, if he make it his common business to entertain passengers. 2d Tomlins, 201.

He is also under an obligation to receive whatever goods his guests bring with them, but he is not bound to receive the goods of one who proposes to deposit them with him and to go elsewhere; for, as he reaps no profit from the deposit of goods, he is not bound to take them under his charge.—Ib.

If one comes to an inn, and makes a previous contract for lodging for a set time, and doth not eat or drink, he is no guest, but a lodger, and so not under the inn-keeper's protection; but if he eats and drinks, or pay for his diet, it is otherwise.—Ib.

The inn-keeper shall not be charged, unless there shall be some default in him or his servant; for, if he that comes with the guest, or who desires to lodge with him, steal his goods, the host is not chargeable; though if an inn-keeper appoint one to lie with another, he shall answer for him. Although the guest deliver not his goods to the inn-keeper to keep, &c., if they be stolen, he shall be charged; but not where the hostler require his guest to put them in such a chamber under lock and key, if he suffers them to be in an outward court, &c.—Ib.

An inn-keeper is liable for all losses which might have been prevented by ordinary care. And, it seems, wherever it be doubtful, whether ordinary care has been used or not, the presumption is against the bailee. If he do not rebut the presumption of a want of ordinary care, arising from the loss of the goods bailed, he is responsible. Newson ads Axon, 1st M'C., 509.

Where the horse of a guest was put into a stable, which was very open, but which had a bar to one door and a lock and key to the other; although the key was delivered to the servant of the guest, yet the inn-keeper is liable for a horse stolen out of his stable; and it seems it would have been the same, had the stable been properly constructed.

Ordinary care, is a question for the jury.—Ib.

2d. Of their Charges.

An inn-keeper is entitled, in his charges to his guests, to estimate only the intrinsic value of that which is furnished to them, but to include a reasonable compensation in respect of the trouble and risk which devolve upon him in the character of inn-keeper, in taking charge of the property of his guests. 2d Tomlins, 202.

If an inn-keeper make a gross overcharge in his bill, the guest may tender him a reasonable amount, which will entitle him to a verdict in an action, or the inn-keeper may be indicted and fined, for such an extortion.—Ib.

If several persons come together in an inn or tavern, and dine there without a special agreement with the inn-keeper, each is liable for the whole expense of the dinner, unless it is known to the inn-keeper that some came there by invitation of others, in which case such persons are not liable even for their own share.—Ib.

3d. Of the remedies of Inn-keepers for their Bills.

Action on the case on an implied assumpsit, will lie against the inn-keeper for things had, where the inn-keeper is obliged by law to furnish him with meat, drink, &c. And, when a guest calls for any thing at an inn, the inn-keeper may justify detaining the person for the thing, or a horse, or other thing, till he is paid his just reckoning. By the custom of the realm, if a man lies in an inn one night, the inn-keeper may detain his horse until he is paid for the expenses; but if he gives the party credit for that time, and lets him depart without payment, he hath waived the benefit of the custom, and must rely on his other agreement, having given credit to the person. 2d Tomlins, 203.

A person brings his horse to an inn, and leaves him in the stable there; the inn-keeper may keep him till the owner pay for the keeping; and, it is said, if he eat out so much as he is worth, the master of the inn, after a reasonable appraisement, may sell the horse and pay himself. But if one bring several horses to an inn, and afterwards takes them all away but one, the inn-keeper may not sell this horse for payment of the debt for the others, but every horse is to be sold to satisfy what is due for his own meat.—Ib.

The inn-keeper is entitled to feed the horse during its detention, and to charge the amount in his account, and that notwithstanding any order from the owner not to do so; for otherwise his security would fail.—Ib.

If an inn-keeper receives a stage-coach, and from time to time

suffers the coach and horses to depart without payment, he gives credit to the owners, and cannot afterwards detain the coach and horses for what was formerly due.—Ib.

A livery-stable keeper, however, may not detain horses for their feed as an inn-keeper, for he is not bound to receive them, and when he does so, it is on a special contract. But if a party agree not to take away horses till they are paid for, and afterwards, under pretence of a ride, take them elsewhere, the stable-keeper may re-take and keep them till his charge is paid.—Ib.

An inn-keeper has no right to detain the property of his guest, as a pledge for what is due him, though he may detain his person; unless in the case of a horse, &c., which may be detained for his feeding, but not for the meat of his master. 2d Bailey, 452.

And the privilege of detainer in any case is confined to regular inn-keepers, who are bound to receive guests.—Ib.

Where one has a complete and enforceable lien on the property of his debtor, a promise of a third person to pay the debt, on condition that the property under the lien is given up, is not within the statute of frauds. An inn-keeper has a lien on the goods of his guest, for the amount of his bill. 1st Rich., 213.

INSURRECTION.

Insurrection,
how to be
punished.

Every slave who shall raise, or attempt to raise, an insurrection in this province, or shall endeavor to delude or entice any slave to run away and leave this province, every such slave and slaves, and his and their accomplices, aiders and abettors, shall, upon conviction as aforesaid, suffer death; provided always, that it shall and may be lawful to and for the justices who shall pronounce sentence against such slave, by and with the advice and consent of the freeholders as aforesaid, if several slaves shall receive sentence at one time, to mitigate and alter the sentence of any slave, other than such as shall be convicted of the homicide of a white person, who they shall think may deserve mercy, and may inflict such corporal punishment (other than death) on any such slave, as they in their discretion shall think fit; any thing herein contained to the contrary thereof in any wise notwithstanding. 7th S. L., 402, sec. 17.

In case the master or other person having charge or government of any slave who shall be accused of any capital crime, shall conceal or convey away any such slave, so that he cannot be brought to trial and condign punishment, every master or other person so offending, shall forfeit the sum of two hundred and fifty pounds current money, if such slave be accused of a capital crime as aforesaid. 7th S. L., 403, sec. 20.

Every person or persons who shall or may be, either directly or indirectly, concerned or connected with any slave or slaves in a state of actual insurrection within this State, or who shall, in any manner or to any extent, excite, counsel, advise, induce, aid, comfort, or assist any slave or slaves to raise, or attempt to raise, an insurrection within this State, by furnishing them with any written or other passport, with any arms or ammunition, or munition of war, or, knowing of their assembling for any purpose tending to treason or insurrection, shall afford to them shelter or protection, or shall permit his, her, or their rooms or houses to be resorted to by any slave or slaves, for any purpose tending to treason or insurrection as aforesaid, shall, on conviction hereof in any Court having jurisdiction thereof, by confession in open Court, or by the testimony of two witnesses, be adjudged guilty of treason against the State, and suffer death. 5th S. L., 503, sec. 1.

Any person or persons who shall hereafter write or publish any inflammatory writing or words, or deliver publicly any inflammatory discourse, tending to alienate the affection or seduce the fidelity of any slave or slaves in this State, shall, on conviction in any Court having jurisdiction thereof, by confession in open Court, or by the testimony of two witnesses, be adjudged guilty of a high misdemeanor, and suffer such punishment, not extending to life or limb, as shall be adjudged by the judge or judges presiding in the Court or Courts before whom such trial or trials may be had.—Ibid, sec. 2.

All persons accused of writing, publishing, or speaking the writing, words or discourses, hereby interdicted, shall be indicted therefor in any Court having competent jurisdiction; in which indictment the writing, words, or discourse published, held or made, shall be plainly and distinctly set forth and charged; and the finding of such indictment by the grand jury shall be held and taken in law, that the words so charged are, under the provisions of this Act, of a seditious and treasonable nature, so as to authorize the arrangement, trial and conviction of the person or persons accused: *Provided*, always, nevertheless, that the said person or persons, so accused, shall be entitled to all the benefits and advantages of others accused of treason, so far

Penalty for
concealing
accused
slave.

Persons
connected
with slaves
in actual
insurrections
to be
adjudged
guilty of
treason.

Penalty on
publishing
any inflam-
matory
writing or
words.

How persons
accused are
to be
proceeded
against.

only as extends to the production of evidence and right of challenge; but not so far as to plead that the offence for which he, she, or they, may be indicted, is not herein and hereby sufficiently and explicitly set forth.—Ibid, sec. 3.

Penalty for circulating papers calculated to disturb the peace.

If any white person shall be duly convicted of having directly or indirectly, circulated or brought within this State, any written or printed paper, with intent to disturb the peace or security of the same, in relation to the slaves of the people of this State, such person shall be adjudged guilty of a high misdemeanor, and shall be fined not exceeding one thousand dollars, and imprisoned not exceeding one year. And if any free person of color shall be convicted, in the mode provided by the law for the trial of such persons, of such offence, he or she shall, for the first offence, be sentenced to pay a fine not exceeding one thousand dollars; and for the second offence, shall be whipped not exceeding fifty lashes, and be banished from the State; and any free person of color who shall return from such banishment, unless by unavoidable accident, shall suffer death without the benefit of clergy. 7th S. L., 460, sec. 6th.

Persons counselling, hiring, or aiding.

If any person or persons shall counsel, aid or hire any slave or slaves, free negroes, or persons of color, to raise any rebellion or insurrection within this State, whether any rebellion or insurrection do actually take place or not, every such person or persons, on conviction thereof, shall be adjudged felons, and suffer death without benefit of clergy. 7th S. L., 462, sec. 8.

INTEREST.

- 1st. ON WHAT DEBTS INTEREST IS RECOVERABLE.
- 2d. COMPUTATION OF INTEREST.
- 3d. WHAT WILL STOP INTEREST.
- 4th. OF USURY.

1st. On what Debts, &c.

Liquidated Demands.—It is a general rule that any note, acknowledgement, or memorandum in writing, fixing, with precision, the amount due, and the time of payment, will be such a liquidation, as will carry interest. Elliott, ads. Minott, 2d McC., 125.

So an order upon a principal, by his agent, for a sum agreed for in favor of a carrier for freight due, will carry interest from its date.—Ib.

In an action for refusing to comply with the terms of a sale at auction, the jury may allow as damages, the difference between the sale and resale, and interest thereon. *Blackwood & Brennan, ads. Leman. Harper, 219.*

The auctioneer may be considered the agent of both parties, and his entry a liquidation of the demand.—*Ibid.*

Where there is a written lease to pay a certain sum annually, if it be not paid annually, it carries interest. *Dorrill vs. Stephens, 4th McC., 59.*

Where the lease is for a term of years, with an annual rent, if the tenant holds over the term, without anything being said as to a new contract, the law presumes that he holds subject to the same annual rent as stipulated in the contract, and if interest is recoverable on the annual arrears of the written lease, it will also be recoverable on the subsequent annual arrears.—*Ibid.*

Where the amount of plaintiff's demand is liquidated in writing, and a day appointed for payment, the jury have no discretion to refuse interest on the debt from that day.—*Ibid.*

Unliquidated Demands.—Unliquidated demands do not bear interest, except in cases where the defendant has been guilty of fraud or imposition. *Conyers vs. Magrath, 4th M'C., 392.*

No interest is recoverable on open or book account, or any unliquidated demand previous to the finding of a jury. *Skirving vs. Executors of Stobo, 2d Bay, 233.*

Interest is not recoverable on an open account, though a time be fixed for payment; unless there be an agreement to pay interest. An agreement may be implied, as from a promise to give a note, or for the usage of trade. *Knight vs. Mitchell, 2d Treadway, 668.*

Interest may be recovered (in an action for money had and received) on money where there is proof, or where, from circumstances, it can be inferred that it has been employed; or wherever it has been obtained by fraud, extortion, oppression, &c. *Goddard ads. Bulow, 1st N. & McC., 45.*

The liquidation of an account by a note, though it should have been by the note of a third person, unless expressly received in payment, does not destroy the open account. Interest has been too often allowed upon a balance of accounts, after it has been acknowledged, to be now disputed. *Barrelli, Torre & Co. vs. Brown & Moses, 1st Mc., 449.*

Interest may be recovered upon account for money had and received; and in all cases of certain or liquidated damages.—*Ibid.*

Interest is not allowed on a demand for work or labor done, goods sold, or any other account not liquidated in writing, even though the money be payable at a day certain. *Farrand vs. Bouchell. Harper, 64.*

Interest is not recoverable on a verbal contract, in which the defendant agreed to pay the plaintiff \$100, for rendering a service. *Farr vs. Farr, 1st Hill, 393.*

Where A. dealt with B., and it was proved to be the general custom at B's store, for the customers to allow interest on open accounts for the last year, from the first of January, unless paid by a particular date thereafter, it was held, that such custom, unless expressly or impliedly sanctioned by the party dealing, could not have the effect of an agreement to pay interest: *Searson ads. Heyward & Co., 1 Spear, 249.*

And where an open account, with interest, was recovered under such proof, a new trial was ordered, unless the plaintiff entered a remitter as to the interest.—*Ibid.*

2d. Computation of Interest.

Where a person has entered into a bond, conditioned for the payment of four per cent. interest on certain legacies, till the legatee came of age, and as each legatee came of age, to pay him his proportion of the principal, the legatees are entitled to seven per cent, (i. e., the legal interest of this State,) from the time the principal came due. *Gaillard ads Ball; 1st N. & M'C., 67.*

Where an action is brought on a bond made in a foreign country, and payable there, the interest of that country, and not the interest of the country in which the action is brought, is recoverable.—*Ibid.*

Where a party contracts to pay a sum of money with interest thereon, on a given day, when the day arrives the interest becomes principal, and if the debt be not paid, the aggregate of principal and interest then due bears interest for the future. *Doig vs. Cathart; 3d Rich., 125.*

On a bond conditioned to pay several sums by different instalments, "without interest, but with interest if not punctually paid," the money not having been punctually paid, it was held, that interest was recoverable from the date of the bond, and not from the time the instalments respectively became due; and the penalty became forfeited by the non-payment of the first instalment. *Wakefield, vs. Beckley, 3d M'Cord, 480.*

The condition of the bonds was, "to pay the full and just sum of

£4,000 on or before 31st of January, 1821, with lawful interest to be paid annually, to commence from this date : held, that the annual interest unpaid became principal and bore interest. *Singleton vs. Lewis*; 2d Hill, 408.

3d. *What will stop Interest.*

A tender of the principal sum due will stop interest. *Petrie vs. Smith*; 1st Bay, 115.

But it must be an actual tender, and not a mere expression of willingness to pay. *Hood vs. Huff*; 2d M'C., 159.

The intervention of war will stop interest on a debt due to an alien enemy. 3d M'C., 340.

4th. *Of Usury.*

What transactions are Usurious.

Evidence of.

What transactions are usurious, and effect thereof.—No person or persons whatsoever, upon any contract which shall be made, shall take, directly or indirectly, for loan of any monies, wares, merchandises, or other commodities whatsoever, above the value of seven pounds for the forbearance of one hundred pounds for one year, and so after that rate for a greater or lesser sum, or for a longer or shorter time, and so according to that rate and proportion, for goods, wares and merchandise lent, to be repaid again in goods, wares, commodities, or in monies. 4th S. L., 364, sec. 1.

Every person lending or advancing money or other commodity upon unlawful interest, shall be allowed to recover, in all cases whatsoever, the amount or value actually lent and advanced; and that the principal sum, amount or value, so lent or advanced, without any interest, shall be deemed and taken, by the Courts, to be the true legal debt or measure of damages, to all intents and purposes whatsoever, to be recovered without costs. 6th S. L., 409, sec. 2.

In case of usury, principal sum without interest may be recovered.

A note of hand usurious between the original parties to the transaction, is absolutely null and void even in the hands of an innocent indorsee, though the holder may recover against an indorser, on a count for money had and received. *Payne vs. Trezevant*, 2d Bay, 23.

A broker who negotiated the business between borrower and lender, though the payee of the note is a competent witness to prove the

usurious transaction. Sending notes into market, under pretence of sale, to raise money, is a shift to elude the statute, if the money is to be returned. Wherever a return of the money is contemplated by the parties, it will constitute a loan, and not a sale.—Ib.

Where a person gave a note of \$500, for valuable consideration, payable sixty days after date, and when it became due, in order to obtain the further time of sixty days, gave his due bill for fifty dollars, and took a renewed note for \$500, payable sixty days after date, the Court held the transaction usurious, and that the note of \$500, as well as that for \$50, was void under the statute; for, it seems, every renewal of a note is a new contract. *Motta vs. Dorrell*, 1st M'Cord, 350.

Where a person borrowed money and gave his note for the amount, with lawful interest, and at the same time made a verbal promise to pay 5 per cent. more interest, making 12 per cent., the Court held, upon an action being brought on the note, that it was usurious and void; although it was left to the borrower's honor only, whether he would pay more than legal interest. *Willard vs. Reeder*, 2d M'Cord, 369.

Where it is customary to pay interest on open accounts after the year expired, and the debtor some time after the expiration of a year, gave his note for the amount due, with interest from the expiration of the year, it is valid, and not usurious. *Dickson vs. Surginer*, 2d Tr., 501.

Where a note, made *bona fide* for valuable consideration, is brought into market, it may, like any other property, be sold for less than its nominal value. *Fleming vs. Mulligan*, 2d M'C., 173.

A note endorsed for the accommodation of the maker, who procures it to be discounted at an illegal rate of interest, is void as against the maker and indorser in the hands of an innocent indorsee; and the fact of the note being a renewal for a part of the original contract, it being between two of the parties to the original contract, does not vary the case. But where a third person, innocent of the usury, takes a new note, it is valid.—Ib.

It seems, even if a part of a security be for a valid debt, and part for an usurious transaction, the whole will be infected, and this where separate notes are given.—Ib.

A note made to raise money, and sent into the market, and sold at an usurious discount, is usurious and void: but *bona fide* notes, and other securities, are subjects of legitimate traffic, and where the

maker of a note made to raise money at an usurious interest, represents to a purchaser, that it is a business note, made for a *bona fide* consideration, and the maker is present and acquiesces, it is a fraud on the purchaser, and they are both liable. *Odell vs. Cook*; 2d il., 59.

Evidence of usury.—In all cases whatsoever, where any suit or action shall be brought, sued, or depending in any Court of record in this State, ^{Borrower a sufficient witness in case of usury.} touching or concerning any usurious bond, specialty, contract, promise, agreement, or taking of usury or higher rates of interest than is allowed by this Act, the borrower or party to such usurious bond, specialty, contract, promise or agreement, or from whom such higher rates of interest is or shall be demanded, had or taken, shall be, and is hereby declared to be, a good and sufficient witness in law to give evidence of such offence against this Act; any law, usage or custom, to the contrary, in any wise notwithstanding. 4th S. L., 464, sec. 2.

Provided, always, that if the person or persons against whom such evidence is offered to be given, will deny upon oath, in open Court ^{Provided} to be administered, the truth of what such evidence offers to swear against him, then such witness shall not be admitted to be sworn; and if any witness or party shall forswear himself in any such matter, and they so doing, and being thereof lawfully convicted, shall suffer all the pains and penalties which by the laws now in force in this State ought to be inflicted on persons convicted of wilful and corrupt perjury.—Ib.

Where usury is set up as a defence to an action, and the plaintiff called upon by the defendant to swear whether the consideration of the contract was usurious or not, and does swear that it was not usurious, the defendant can not introduce other witnesses to contradict the plaintiff. *Fulmer vs. Hays*, 3d M'C., 256.

But the plaintiff may be called upon to prove one fact, and other witnesses to prove other facts, connected with it, all of which, taken together, may establish the usury, which could not be made to appear by any one witness.—Ib.

Usury may, sometimes, be inferred from a train of circumstances.

Where the defendant, in a case of usury, offered to swear to the circumstances of usury, and for that purpose made a statement of the facts he would swear to, and the plaintiff makes himself a witness against the Act, it is not enough that he denies generally the truth of the statement made by the defendant, he must submit to be examined

by the defendant in answer to the facts stated by him. *Murden vs. Clifford*, 4th M'C., 65.

The Court thought the best practice would be, to require the defendant to make his statement in writing, and then to examine the plaintiff in answer to the statement.—Ib.

The maker of a promissory note, against whom a judgement has been recovered, is a competent witness at common law in a suit by the same plaintiff, the lender against the indorser, to prove usury. *Kechely vs. Cheer*, 4th M'C., 397.

The lender can only be a witness under the Act, where the usury is offered to be proved by the evidence of the borrower, and where the borrower is not a competent witness at the common law.—Ib.

Though a third person sue upon a contract said to be usurious, and the defendant offers to swear to the usury, the lender, though no party to the suit, may, under the Act, be examined to deny the usury. *Harick vs. Jones*; 4th M'C., 402.

Notes originally founded on a good consideration, though afterwards sold for less than they are nominally worth, do not make a case of usury; but if originally discounted for less than their nominal amounts, it is usury.—Ib.

JAIL AND JAILORS.

1st. WHO SHALL BE KEEPERS OF JAILS.

2d. WHAT PRISONERS JAILORS BOUND TO RECEIVE AND KEEP.

3d. HOW THEY SHALL BE KEPT.

4th. HOW SUPPORTED.

5th. HOW DELIVERED.

6th. OF ESCAPES.

7th. OF PUNISHMENT OF JAILOR FOR MALTREATMENT OF PRISONERS.

1st. *Who shall be Keepers of Jails.*

By Act of 1839, page 83, sec. 41; It shall be the duty of every sheriff in this State, who does not live in the jail, to employ a proper and discreet person as jailor, who shall live within the same, and who is hereby prohibited from using the house for any other purpose than that for which it was designated by law; and the sheriff shall appoint such jailor in writing, which shall be deposited in the clerk's office.

Sheriff to
appoint, and
be liable for
jailor.

The sheriff shall have the custody of the jail of his district, and if he point a jailor, he shall be liable for him.—Ibid.

On vacancy in the office of sheriff, the clerk shall take charge of a jail and prisoners. 6th S. L., 185.

2d. What Prisoners Jailor is bound to receive and keep.

Every sheriff and jailor is required to receive into, and safely keep such his jail, until delivered by due course of law, any person or persons who shall be committed thereto, by a warrant, signed by a judge, or justice, of this State, or of the United States, under penalty or refusal of fine or imprisonment, or both, as may appear proper in the discretion of the Court. 7th S. L., 257.

To receive all persons committed by warrant of judge or justice.

The jailor is required to receive and confine all runaway slaves, arrested in his district, and committed to his custody. 7th S. L., 430.

To receive runaways.

No pauper, idiot, lunatic or epileptic, shall hereafter be confined for safe keeping, in any jail; and if any such person shall be imprisoned by virtue of any legal process, it shall be the duty of the sheriff in whose custody he may be, to obtain his discharge as speedily as possible, and send him forthwith to the Asylum, according to law. Act 1839, p. 35.

Lunatics, etc not to be confined in jail.

The several jailors of this State, who may be keepers of the jails, nearest to those that may be destroyed by fire or other accident, are authorized and required to receive and keep the prisoners from such jail, and shall receive the fees provided by law, for the safe keeping of such prisoners.—Ibid., p. 32.

Removal of prisoners on destruction of jail.

The sheriffs or jailors in the several districts of this State, shall keep in safe custody all such prisoners as may be committed to them under the authority of the United States, until such prisoners are discharged by due course of law of the United States, under the like penalties, as in case of prisoners committed under the authority of this State, and upon the terms of the resolution of Congress. A. D., 1789, vide 5th S. L., 379.—Ibid.

To keep prisoners of United States.

3d. How Prisoners shall be kept.

Sheriffs and jailors shall keep prisoners for debt, and felons, in separate apartments of the jail, and the officer herein offending, shall be liable to an action of the party grieved, and also to an indictment, and on conviction, shall be punished as for a misdemeanor. Act 1839, page 32.

Debtors and felons to be kept separate.

By the 31 C. 2, c. 2, if any person shall be committed to any prison for any criminal or supposed criminal offence, he shall not be removed

from thence, unless it be by *habeas corpus*, or some other legal writ; or where he is removed from one prison or place to another, within the same county, in order to his trial or discharge; or in case of sudden fire or infection, or other necessity, on pain that the person signing any warrant for such removal, and person executing the same, shall forfeit, for the first offence, £100, and for the second £200, to the party grieved. S. 9.

By the 22 and 23 C. 2, c. 20, the jailor shall not put, keep, or lodge prisoners for debt, and felons, together in one room or chamber, but they shall be put, kept, and lodged, separate and apart from one another, in distinct rooms, on pain of forfeiting his office, and treble damages to the party grieved. S. 13.

Nevertheless, it seemeth generally in all cases, where a man is committed to prison, especially if it be for felony, or upon an execution, or but for a trespass, or other offence, every jailor ought to keep such prisoner in safe and close custody; safe that he cannot escape, and close, without conference with others, or intelligence of things abroad. Dalt., c. 170.

And therefore, if the jailor shall license his prisoner to jail, and for a time, and then to come again, or to go abroad with a keeper, though he come again, yet these are escapes. Dalt., c. 170.

And hereupon it is lawful for the jailor to hamper a felon with irons, to prevent his escape. 1 H. H., 601; Dalt., c. 170. And it is said that a jailor is in no way punishable for keeping even a debtor in irons. 2 Haw., 152.

But the learned editor of Hale's history observes, that this liberty, even in the case of a felon, (much more in the case of a prisoner for debt) can only be intended where the officer has just reason to fear an escape; as where the prisoner is unruly, or makes any attempt to that purpose; but otherwise, notwithstanding the common practice of jailors, it seems altogether unwarrantable, contrary to the mildness and humanity of the laws of England, by which jailors are forbidden to put their prisoners to any pain or torment. And Lord Coke, 2 Inst., 381, is express, that by the common law it might not be done. 1 H. H., 601.

And if the jailor keep the prisoner more strictly than he ought of right, whereof the prisoner dieth, this is felony in the jailor by the common law; and this is the cause, that if a prisoner die in jail, the coroner ought to sit upon him; and if the death was owing to cruel and oppressive usage on the part of the jailor, or any officer of his, it

be deemed wilful murder, in the person guilty of such duress. 3 t., 91; Fost., 321, 322.

But if a criminal, endeavoring to break the jail, assault his jailor, may be lawfully killed by him in the affray. 1 Haw., 71; 1 H., 496. For jailors and their officers are under the same special protection that other ministers of justice are: and therefore, if in the necessary discharge of their duty, they meet with resistance, whether on prisoners in civil or criminal suits, or from others in behalf of such prisoners, they are not obliged to retreat as far as they can with safety, but may freely, and without retreating, repel force with force: and if the party so resisting happeneth to be killed, this on the part of the jailor, or his officer, or any person coming in aid of him, will be justifiable homicide. On the other hand, if the jailor, or his officer, or any person coming in aid of him, should fall in the conflict, this will amount to wilful murder in all persons joining in such resistance; and is homicide committed in defiance of the justice of this State. Fost., 1.

Every sheriff shall provide, at the expense of the State, a sufficient number of blankets for the use of the prisoners confined in their respective jails; and every prisoner, so confined on a criminal charge, shall be furnished with at least two blankets during the winter season. A., 1806.

4th. How Supported.

Where any person shall be taken on *mesne* or final process, in any civil suit, and from inability to pay the debt, demand or damages, or to give bail, if committed to jail, and such person has no lands, tenements, goods, chattels, or choses in action, whereby his maintenance in jail can be defrayed, the plaintiff or person, at whose instance such party shall be imprisoned, shall pay and satisfy the same, and if such person, or his attorney, shall refuse or neglect after ten days notice, to give, or give security to pay the same, when demanded, the sheriff or jailor, in whose custody such prisoner is, may discharge him from confinement. *Provided*, however, that such prisoner shall, before he is discharged, render on oath a schedule of all his estate, and assign the same. Act 1839, p. 31.

Plaintiff
liable for
maintenance
of debtor.

The maintenance of prisoners, in all criminal cases, is at the expense of the State, where they are acquitted; or being convicted, are charged from inability to pay costs. 6th S. L., 353.

State to pay
in criminal
cases.

4th. How Prisoners shall be delivered.

By the 3 H. 7, c. 3, those that have the custody of jails must certify

the names of all prisoners, to the justices of jail delivery, in order to their trial or discharge, on pain of five pounds.

And a jailor must not disobey a writ of *habeas corpus* for want of his fees; but the Court will not turn the prisoner over, till the jailor be paid all his fees. 2 Haw., 151.

5th. Of Escapes.

An Escape.

If any sheriff shall permit any prisoner to be without the prison walls, without lawful authority, it shall be an escape: *Provided*, nevertheless, he may and shall discharge a defendant in custody, on *mesne process* in a civil case, when the plaintiff is non-suited.

May be retaken on Sunday, etc.

It shall be lawful for the sheriff, deputy sheriff, or jailor, to retake on Sunday, as on any other day, and at Court, muster, or any other place, any prisoner who has escaped.

Escapes and liabilities therefor.

If any sheriff, or his deputy, shall permit any prisoner, committed to his custody, on *mesne* or final process, in any civil action, to go or be without the prison walls, if such prisoner has not given the security required by law; or if such security has been given, if any sheriff or his deputy suffer such prisoner to go or be at large, out of the rules of the prison, (except by some writ or *habeas corpus*, or rule of Court, which rule shall not be granted but by motion in open court.) such going and being out of the prison rules, as the case may be, shall be adjudged and deemed, as is hereby declared, an escape.

If any sheriff, or his deputy, shall, after one day's notice in writing, given for that purpose, refuse to shew any prisoner committed to his charge, to the plaintiff, at whose suit such prisoner was committed, or his attorney, such refusal shall be judged to be an escape.

Upon an escape, the plaintiff may either proceed against the defendant to retake him, or against his security; or in case the security should prove deficient, against the sheriff, who shall be ultimately answerable in damages for such escape.

Liability for on final process.

The Sheriff shall be liable in an action on the case, or of debt, for a negligent or voluntary escape of a prisoner confined on final process, to the extent of debt, interest, and costs.

On mesne process.

For a *voluntary* escape on *mesne process*, he shall be liable to the amount that the plaintiff would have been entitled to recover against the prisoner, and for a *negligent* escape, for such damage as the plaintiff may have sustained; provided that the insolvency of the prisoner shall not mitigate the damages below the amount sufficient to carry costs.

If any sheriff, deputy sheriff, or jailor, having the custody of any

ner, who has been found guilty of any offence, shall permit a voluntary escape of such prisoner; such sheriff, deputy sheriff, or jailor, shall, upon indictment and conviction thereof, suffer the punishment provided by law, for the offence, of which such prisoner was convicted.

Any sheriff, deputy sheriff, or jailor, having the custody of any prisoner charged with any offence, or committed by the order or warrant of any competent authority before such prisoner has been found guilty or legally discharged, shall permit a voluntary or negligent escape of such prisoner, such sheriff, etc., shall, upon conviction thereof, be liable to fine and imprisonment at the discretion of the Court; and for permitting a voluntary escape of any prisoner, confined on mesne or final process in any civil suit, shall, on conviction thereof on indictment, be fined and imprisoned at the discretion of the Court. Act 1839, 31, 32.

6th. Punishment of Jailor for maltreatment of Prisoners.

By Stat. 14 Ed. 3, c. 10; if any jailor by duress of imprisonment, induces any prisoner that he hath in ward, to become an approver or tellor against his will, it shall be felony in the jailor. And a jailor may be discharged and fined for barbarously misusing his prisoners. 1 Russ., 140.

If a prisoner dies from cruel and oppressive usage on the part of the jailor or any officer of his, it will be deemed wilful murder in the jailor or officer guilty of such duress. The person guilty of such duress will be the party liable to prosecution, because though in a civil suit the principal is answerable in damages to the party injured through the fault of the deputy, yet in a capital prosecution, the sole object of which is the punishment of the delinquent, each man must answer for his own defaults. Ibid, 459.

JURISDICTION.

Whether a matter falls within the jurisdiction of a single magistrate, or requires the presence of two, may be seen by reference to the particular subject inquired of, viz., for the jurisdiction of a magistrate in Attachment Bail, Causes small and mean, &c., see those

LAW OF MAGISTRATES.

1st. GENERAL JURISDICTION AND POWERS.

2d. REMEDY WHEN JURISDICTION IS EXCEEDED.

1st. *General Jurisdiction.*

Jurisdiction,
powers and
duties.

Every magistrate shall have civil and criminal jurisdiction throughout the judicial district in which he resides, and shall execute all the powers and duties heretofore lawfully executed by a justice of the quorum; he shall be authorized and required, to command all persons who, in his view may be engaged in violations or disorderly conduct, to the disturbance of the peace, to desist therefrom; and to arrest any such person who shall refuse obedience to his command, and to commit to jail any such person who shall fail to enter into sufficient recognizance, either to keep the peace, or to answer to an indictment, as the magistrate may determine. In like manner, he shall arrest and commit, if necessary, any person who in his view, shall perpetrate any crime or misdemeanor whatsoever. In making any such arrest, the magistrate shall have power to command any constable, bystanders, or the *posse comitatus*, as the emergency may require; and any person who shall refuse to aid in such arrest, when required by the magistrate, shall be liable to indictment, as for a misdemeanor. Wherever there shall be an indictment for any offence committed in his view, the magistrate shall be the prosecutor, and he shall bind in recognizance all necessary witnesses. Act of 1839, 14, sec. 3.

Duty, under
a complaint
on oath.

When complaint or oath shall be made before any magistrate, that a felony or misdemeanor has been committed, or that the informant has good reasons to believe, and does verily believe the same, or when such magistrate is otherwise reasonably satisfied thereof, he is hereby empowered and required to issue his warrant, under his hand and seal, against the party charged, directed to any lawful officer within this State, wherein shall be plainly expressed the offence charged, and supposed time of its commission, commanding him to arrest and bring such offender before himself, or next magistrate, to be further dealt with, as the law may direct, which said warrant shall be forthwith delivered to the proper officer, and shall authorize the arrest and detention of any person so charged within any district in the State; *provided*, that when issuing such warrant, upon the information of another, such magistrate shall accompany the warrant with the oath taken, to be subscribed by the deponent, and shall require the party demanding the same, to enter into recognizance, with good surety, to appear and prosecute. *Ib.*, sec. 4.

Any magistrate, according to the established forms of proceeding, ^{Offences within the jurisdiction of U. S. Courts.} or offences against this State, (at the expense of the United States, and to be tried by such Court of the United States as may have cognizance of the offence,) may order the arrest, imprisonment, or bail, of a person charged with a crime or offence against the United States, alleged to have been committed within this State; and a copy of the process shall be returned as speedily as may be into the office of the clerk of such Court, together with the recognizances of the witnesses for their appearance to testify in the case, which recognizances any magistrate may require on pain of imprisonment; and if such offender be committed within a district in which the offence cannot be tried, the magistrate ordering the arrest shall issue his warrant for the removal of the offender and witnesses to the proper district. Acts of 1839, 17, sec. 14th.

2d. Remedy, &c.

A prohibition may issue upon a suggestion, that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other Court. *State vs. Sadler*, 2d N. & M'C., 174.

A prohibition will not lie to an inferior Court after sentence, unless there want of jurisdiction appear on the face of the proceedings. *Ib.*

Every Court acting clearly within its jurisdiction, in a case legally admitted, is independent of all others, to which no appeal is given. No prohibition lies to restrain the proceedings of a court martial for irregularities, as long as it acts within its jurisdiction. *State vs. Wakely*, 2d N. & M'C., 410.

Where a declaration in prohibition set forth, that in the trial of a negro slave, by justices and freeholders, under the Act of 1740, authorized individuals had tried the slaves, and that testimony was received on the trial, in opposition to the rules of the common law; which there was a general demurrer; held, that the plaintiff must give judgement, and a writ of prohibition issue, as the demurrer admitted the truth of facts, on which a prohibition ought to be awarded. *State vs. Hudnall*, 2d N. & M'C., 419.

It is not necessary that the ground on which the prohibition is awarded, should arise on the face of the proceedings of the inferior court.—*Ib.*

Where the matter suggested for a prohibition, appears on the face of the proceedings of the inferior Court, an affidavit of the truth of the

suggestion is unnecessary; where it does not so appear, it is essential that the suggestion should be verified by affidavit.—*Ib.*

The Court of Sessions will prohibit the execution of judgement of death, erroneously awarded by a Court of magistrates and freeholders against a slave for an offence not capital. A prohibition will be granted, wherever an inferior Court, in handling matters clearly within its cognizance, transgresses the bounds prescribed to it by law. *State vs. Ridgell*; 2d Bail., 560.

An action cannot be maintained in the Courts of this State upon a decree, obtained in a Court of another State, against a defendant, who was not within the jurisdiction of such Court, and who appeared, by the proceedings, to have been made a party merely by the publication of a rule in a gazette, but had in no way appeared to, or defended the suit. *Ex'ors of Miller, vs. Miller*; 1st Bail., 242.

The validity of every judgement depends upon the authority which the Court possessed over the subject of its adjudication; and it is therefore competent for every tribunal, when a judgement is produced before it as the foundation of an action, to inquire in the first place into the jurisdiction of the Court, by which it was rendered; and if it appear on the face of the proceedings that the Court had no jurisdiction, its judgement can have no effect, but must be regarded as a nullity.—*Ib.*

To entitle the judgement or decree of a Court of one of the United States to *full faith and credit* in the Courts of the other States, under the provisions of the Constitution, it is essential, that such Court should have had jurisdiction both of the parties, and the cause.—*Ib.*

Where a party, charged with a criminal offence, is brought for trial before a Court of Magistrates and Freeholders, and claims to be a white man; if he plead the fact in that Court, and it is there determined against him, he is concluded by its adjudication; if he desire to have the question tried by a jury, his course is to apply, in the first instance, to the Court of Sessions for a prohibition. *State vs. Scott*; 1st Bailey, 294.

Prima facie, every Court possesses the power of judging of its own jurisdiction; and where a party pleads to the jurisdiction, the decision of even an inferior Court, in favor of its jurisdiction, is, ordinarily, as conclusive upon the parties, as its judgement upon a matter confessedly within its jurisdiction: the only exception is, where the want of jurisdiction appears on the face of the proceedings. A party, however, is not compelled to submit the question of jurisdiction to the decision

he Inferior Court, but may remove it to the Superior Court, by applying for a prohibition.—Ibid.

The provision of the Act of 1740, requiring Courts of Magistrates and Freeholders for the trial of slaves, to assemble for the trial within three days, extended by the Act of 1754 to six days, after the person be tried shall have been apprehended, is directory to the Court, and not a limitation of the prosecution; and furnishes no objection to the Court's proceeding to the trial after the expiration of the time specified.—Ibid.

Granting or denying a writ of prohibition, is in a great measure discretionary with the Court. But it is the duty of the superior Courts of law to confine all subordinate jurisdictions to their proper bounds; and the question of jurisdiction is to be determined by the superior and not the inferior Court. *Gray vs. Court of Magistrates and Freeholders*, 3d McC., 175.

Generally, a prohibition may be awarded, as well after, as before, judgment; but the converse is true in cases where the Court had jurisdiction of the matter, but was restrained by some statute, and the party, by pleading, admits the jurisdiction.—Ibid.

A party has a right to appeal, on an application for a prohibition, from an order made at Chambers, or on Circuit; and it seems the inferior Court has no right to proceed after notice of such appeal. It has been sometimes the practice to grant a prohibition, until the termination of the appeal.—Ibid.

JUSTICE OF THE PEACE AND QUORUM.

[See MAGISTRATES.]

LANDLORD AND TENANT.

1st. OF THE TENANCY.

2d. OF THE RENT. [See also DISTRESS.]

3d. OF THE REPAIRS.

4th. OF THE DETERMINATION OF THE TENANCY, AND GETTING POSSESSION BY THE LANDLORD.

5th. RIGHT OF TENANT TO REMOVE.

6th. PRECEDENTS.

1st. *Of the Tenancy.*

Neither the plea of *nil habuit in tenementis*, *nil demisit*, nor *res passa*, can be pleaded to covenant for rent on an indenture, for it operates as an estoppel. But the estoppel only exists during the continuance of the occupation of the tenant; and if he be ousted by a paramount title, he may plead it. *Maverick vs. Lewis & Gibbs*, 3d M'C., 211.

An outstanding title, alone, will not discharge a lessee by indenture. He must be evicted, or prevented from entering or from enjoying the thing demised, by virtue of such title; and he must set out the title in his plea, and shew particularly how it arises.—*Ibid*.

Where a person was in possession by an outstanding lease, and refused to give possession to the new lessee, it is tantamount to an eviction.—*Ibid*.

No particular words are necessary to constitute a lease, but there must be an interest in the freehold conveyed; and an agreement to take charge of a farm and to work on shares is not such an outstanding lease, as will amount to an eviction, where the person in possession under such agreement, refused to deliver possession to the lessee.—*Id*.

Leases for more than one year to be recorded in three months.

All leases or contracts in writing, hereafter to be made between landlord and tenant, for a longer term than twelve months, shall not be valid in law, against the rights and claims of third persons, unless the same shall have been recorded in the office of Mesne Conveyance, at least within three months from the time of the execution thereof; nor shall any payment, made in anticipation of rent, for a longer time than twelve months, be considered a valid discount against the claims and rights of third persons. 6th S. L., 67, sect. 1st.

But where a purchaser has received express notice of an existing lease, before making his purchase, such lease, although not recorded, conformably to the requisitions of the Act of 1817, will be valid and effectual against the conveyance of the purchaser, although the latter has been duly recorded. *Anderson vs. Harris*, 1 Bailey, 315.

How and when to terminate.

Every lease or written agreement hereafter to be entered into, for the renting and leasing of lands and tenements, shall absolutely and unequivocally end and determine at the period therein stated, without it being obligatory on the tenant or the landlord, to give the notice now required by law. 6th S. L., 67, sec. 2d.

In order to put an end to a tenancy from year to year, there must

be three months notice to quit, ending at the expiration of the year. *Godard vs. R. R. Comp.*, 2 Rich., 346.

The Acts of 1808 and 1817, have not altered the common law in relation to tenancies from year to year, and the necessity of notice to quit, before the tenancy can be determined, either by the landlord or the tenant.—*Ibid.*

Where the lease is for a term of years, with an annual rent, if the tenant holds over the term, without any thing being said as to a new contract, the law presumes that he holds, subject to the same annual rent as stipulated in the contract, and if interest is recoverable on the annual arrears of the written lease, it will also be recoverable on the subsequent annual arrears. *Dorrill vs. Stephens*, 4th M'C., 59.

No parole lease shall give a tenant a right of possession for a longer term than twelve months from the time of entering on the premises; and all such leases shall be understood to be for one year, unless it be stipulated to be for a shorter term.

No parole lease to give possession longer than twelve months.

In the case of *Godard vs. R. R. Company*, above referred to, it was also held, upon review of the English authorities, that a general holding, such as was formerly held a tenancy at will, was now established as a tenancy from year to year, and such is entitled to notice to quit.

2d. Of the Rent.

Where a tenant is dispossessed by an enemy, he ought to pay rent only for the time he peaceably enjoyed, and not for the time he was prevented by the casualties of war. *Bayly vs. Lawrence*, 1st Bay, 499.

Under a plea of no rent in arrear, the defendant may shew that the house was rendered uninhabitable by a storm. It seems, if one rents a house for a year, and during the term, it is rendered untenable by a storm, the rent ought to be apportioned according to the time it was occupied. *Ripley vs. Wightman*, 4th M'C., 447.

All tenants, whether for life or years, by sufferance or at will, or persons coming in under, or by collusion with them, who shall hold over, after the legal determination of their estates, after demand made in writing, for delivering possession thereof by the person having the reversion or remainder therein, or his agent, such tenant or other person holding over, for the space of three months, after such demand, shall forfeit double the value of the use of the premises, recoverable by action of debt or other legal action, or by distress, as in cases of rent recovered and payable quarter yearly. 5th S. L., 565, sec. 3.

Penalty on tenants for continuing in possession for three months after demand is made.

In case any tenant shall give notice in writing, of his intention to

Penalty on
tenants for
not delivering
possession
according to
notice.

quit the premises, and shall not accordingly deliver up the possession at the time in such notice contained, the said tenant, his executors or administrators, shall pay to the landlord double the rent which he would otherwise have been liable to pay, which shall be recoverable in manner aforesaid. *Provided*, nevertheless, that nothing herein contained shall be construed to give such tenant a right to discontinue or determine his tenancy by such notice, in any other manner than according to the laws heretofore existing.—*Ibid*, sec. 4.

The defendant's intestate sold a plantation, and gave a bond to make titles to the purchaser, taking from the latter a promissory note for the purchase money.—*Reeves vs. McKenzie*, 1st Bailey, 497.

The defendant recovered judgement on the note, but afterwards agreed to take the land in satisfaction of the judgement, and accepted from the purchaser a release of his interest under the bond to make titles: he then leased it to the purchaser for a term, reserving a rent certain; but in the lease was a condition, that if a certain portion of the judgement were paid within a limited time, the lease should be void. Subsequently upon a *scire facias* on the judgement, the jury, upon evidence of the release, found for the purchaser on the plea of payment. Held, to be no performance of the condition of the lease, and that the defendant was entitled to distrain for the rent in arrear. *Ibid*.

If a rent certain be reserved, subject to a condition to be performed by the tenant, the landlord may distrain, notwithstanding the condition, unless the tenant shew a performance.—*Ibid*.

Where a tenant holds over, for three months or more, after the expiration of his term, and notice to quit, he is liable, under the Act of 1808, to double rent from the day of notice, and not from the expiration of the three months only.—*Ibid*.

Although the English rule, that stray cattle are distrainable for rent, where they have been *levant et couchant* upon the land, may not be applicable to the agricultural usages of this country; yet, when the cattle, &c. of third persons have been put upon the premises, with the consent of the owners, they are liable to distress: nor will it make any difference, that the landlord was informed, that they did not belong to the tenant. Goods left in appropriate public places of deposit, constitute an exception to the general rule.—*Ibid*.

The tenant of a landlord, whose interest has been sold by the sheriff (or coroner) is not bound to pay rent, accruing after the sale, to his lessor. *Moore vs. Turpin & Powers*, 1st Spears, 32.

Where the tenant of a landlord, whose interest has been sold by

heriff, afterwards, with notice of that fact, paid the whole year's to his original landlord, it was held that the purchaser was entitled to recover from the tenant that proportion of the rent which he had paid after his purchase. *Snyder vs. Riley*, 1st Spear, 272.

It has been usual to allow to the purchaser his proportion of the rent measured from the time of his purchase.—Ib.

Where the tenant voluntarily pays the whole rent before due to his former landlord, and after notice of his landlord being changed, there can be no reason in turning the purchaser round to his possible injury against him. If the tenant had received no notice, and had paid the rent only at maturity, such might have been the proper result.—Ib.

3d. Of the Repairs.

Tenants, unless by express contract, have no right to charge their landlords for repairs; and this rule, *a fortiori*, applies, where the tenant knew that the premises were out of repair, and covenanted to leave them in the order in which they were when received. *City of New York vs. Moorhead*; 2d Rich., 480.

A general covenant to repair is satisfied by the lessee keeping the premises in substantial repair; a literal performance of the contract is not to be required. 2d Harrison, 1424.

Under a covenant that the tenant "should and would substantially repair, uphold, and maintain" a house, he is bound to keep up the repairs.—Ib.

An agreement to leave a farm as he found it, is an agreement to leave it in a tenantable repair, if he found it so; and will maintain a variation so laid.—Ib.

A tenant from year to year is only bound to fair and tenantable repairs, so far as to prevent waste or decay of the premises, and not substantial and lasting repairs, such as new roofing, &c.—Ibid, 5.

And not being liable to general repairs, he is only bound to use the premises in a husband-like manner, but no farther.—Ib.

A tenant, from year to year, of a house, is only bound to keep it clean and water tight. A tenant who covenants to repair, is to sustain and uphold the premises; but that is not so with a tenant from year to year.—Ib.

A tenant of a house from year to year, not under any agreement

to repair, may quit, without previous notice to his landlord, on the premises becoming unsafe and useless from want of repairs; and such tenant is not liable, in an action for use and occupation, for any rent after the occupation has ceased to be beneficial.—Ib.

Therefore, where the lessee of a house under-let the same at Lady-day to A. as tenant from year to year, and before the end of the half year put workmen into the house with A's. consent, for the purpose of repairing a party-wall, but the inconvenience occasioned thereby was so great that A's lodgers quitted the house, and he was obliged to take lodgings for his own family elsewhere, and, after paying the rent up to midsummer-day, he remained in possession, carrying on his trade, till the 5th July, and then quitted without notice to his landlord: held, that the latter could not maintain an action for use and occupation for the second half year which had thus commenced, the jury finding that there had been no beneficial occupation.—Ib.

A tenant of a house, who is bound by agreement to keep it in tenantable repair, may quit without notice in the course of his term, if the premises become unwholesome for want of sufficient drainage, and they cannot be kept dry without extravagant and unreasonable labour and expense on his part.—Ib.

A landlord has no right to enter his tenants premises to repair them, without there was some stipulation at the time of letting to that effect. Ibid, 1426.

4th. Of the Determination of, &c.

Tenants
holding over
landlords.

On the determination of any lease, in writing or by parol, of any lands and tenements within the State, when the lessee shall hold over thereafter, any two magistrates of the district where the same may be situated, are authorized and required, on the complaint and due proof thereof by any lessor, his heirs or assigns, to place the names of twenty four neighboring freeholders in a box, and from them draw the names of eighteen, and shall thereupon issue their warrant in the nature of a summons, directed to the sheriff, or any constable of the district, commanding such officer to summon the said eighteen freeholders to attend at a certain time, within four days, and at a place appointed; and from the said eighteen freeholders so summoned, twelve shall be drawn in the same manner, who shall be empanelled to try the facts; provided, that if from the said eighteen so summoned, the number of twelve cannot from any cause be had, the magistrates are authorized to complete the number from the remainder originally

sted; and the said magistrates shall also summon the said lessee, any other person claiming or coming into possession under him, at same time, and in the same way, likewise to appear before them new cause, if any such lessee or other person may have, why session of the premises should not be forthwith restored to such or, his heirs or assigns; and if, upon hearing the case, they shall satisfied that the complainant is entitled to the possession of the sizes in question, they shall so find; whereof the said magistrates I make a record, and shall thereupon issue their warrant, directed to the sheriff of the district, commanding him forthwith to deliver to the lessor, his heirs or assigns, full possession of the premises, and to pay all expenses incurred, of the goods and chattels of the lessee or other person in possession, as aforesaid. Act of 1839, p. 21, 23.

We have seen, by the Act of 1817, that a lease may be determined at its own limitation without notice to quit, except in case of a tenancy year to year, in which case, according to the case above cited, six months notice is required. It may also be determined by forfeiture.

ii. For making alterations of the premises.

i. For non-payment of rent, or non-performance of other covenants.

For making alterations.—It shall not be lawful for any tenant to make alterations, or remove buildings, erected upon the leased premises, without permission first had in writing, under pain of forfeiting the residue of the unexpired term of said lease or agreement, parole written; which said forfeiture shall be ascertained by a justice of peace or quorum, with the jurors to be drawn in the same manner as prescribed by this Act, and with like powers where the landlord is placed in possession. 6th S. L., 68, sec. 8.

Tenant not allowed to make alterations.

For non-payment of rent, &c.—Where a lease contained two clauses for re-entry; the one, in case the yearly rent of £300 was in arrear thirty days after it became payable, and the other, in case the yearly rent were in arrear, which was stated to be payable half yearly Lady-day and Michaelmas: held, that the landlord had a right to enter on non-payment of each half year's rent; as the former lease contained the description of the amount to be annually paid, the latter the times for payment. 2d Harrison, 1401.

To support an ejectment on a forfeiture of a lease, by non-performance of a covenant, if the covenant be to do an act, the lessor of the

plaintiff must give some evidence of the omission of the act; and, if the covenant be for payment of rent, the lessor of the plaintiff must prove a demand of such rent. Ibid, 1402.

A lease contained a clause of re-entry in case the term of years thereby granted should be extended or taken in execution; and before the end of the term the sheriff entered the premises under a writ of extent against the lessee at the suit of the crown, held an inquisition, and seized the lessee's interest into the king's hands: held, that this proceeding was a taking in execution within the latter clause of the condition, and that the term was determined and forfeited to the lessor.—Ib.

Where in a lease, a power of re-entry for a breach of covenant is reserved to the lessor, a forfeiture may be waived, as the lease is thereby rendered voidable only. Ibid, 1403.

Acceptance of rent after a forfeiture is a waiver of the forfeiture, if the fact of forfeiture was known to the lessor at the time.—Ib.

If ejectment is brought on a forfeiture of a lease, and after the bringing of such ejectment the landlord accept rent, it is no waiver of the forfeiture.—Ib.

A distress and continuance in possession might be a waiver of an existing forfeiture, but not so as to any right which accrued subsequently.—Ib.

Taking an insufficient distress after the forfeiture, for rent accruing before, is not a waiver of the right to re-enter.—Ib.

6th. *Right of Tenant to remove Fixtures.*

With regard to a tenant for years, it is fully established he may take down useful and necessary erections for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage. It has been so held in the case of cider mills. A tenant for years may also carry away ornamental marble chimney-pieces, wainscot fixed only by screws, and such like. But erections for the purposes of farming and agriculture do not come under the exception with respect to trade, and cannot be taken down again. And where the tenant has covenanted to leave all buildings, &c., he cannot remove even erections for trade. Where a tenant for years has a right to remove erections and fixtures during his lease, and omits doing it, he is a trespasser afterwards for going upon the land, but not a trespasser *de bonis asportatis*. A farmer who raises young fruit trees on the demised land for filling up his lessor's orchards, is not

titled to sell them, unless he is a nurseryman by trade. 2 Blackme, 282. (Note.)

Though a building may be raised on a brick foundation, and have a brick chimney, if the erection of such foundation is of wood, and the building be used for the purpose of trade or manufacture, the tenant may remove it at the end of his term. 2d Harrison, 1179.

The machinery of a mill is part of the freehold, and cannot be legally removed by the tenant.—Ibid.

Window sashes, which are neither hung nor beaded into the frames, but merely fastened by laths, nailed across the frames to prevent their falling out, are not fixed to the freehold.—Ibid, 1180.

A pump, erected by a tenant, and so fixed as to be removable without injury, to the freehold, may be taken away by him at the expiration of his term, as being an article of domestic use or convenience.—Ibid.

A tenant (not a gardener by trade,) cannot remove a border of box, planted by himself on the premises demised, unless by special agreement with the landlord.—Ibid.

7th. *Precedents.*

Lease. -

STATE OF SOUTH-CAROLINA.

This indenture, made the day of , Anno Domini, one thousand and eight hundred and , between of the first part, and the lessee of the second part, witnesseth, that the said hath granted, bargained and leased, and by these presents, both grant, bargain and lease, unto the said To have and to hold the said with the appurtenances, unto the said executors, administrators and assigns, for the term of from the date hereof, yielding and paying therefor the sum of the ending on the day of . And the said executors and administrators, doth hereby covenant and agree, to and with the said , well and truly to pay the above reserved and stipulated rent, at the time above limited; and also, the same sum or rent on the day next after the day on which every subsequent shall end; and it is further stipulated, that before the expiration of the term for which the said premises are leased, the said tenant shall give notice of intention to vacate the aforesaid premises. And it is further stipulated and understood, by and between all the parties to these presents, that if it should so happen, that rent shall at any time be in arrears and unpaid, then the above mentioned term shall

LAW OF MAGISTRATES.

immediately cease and determine; and it shall be lawful for the party of the first part, to re-enter into and forthwith re-possess all and singular the above granted and leased premises. And it is lastly stipulated, that the said shall not, without the consent of the lessor, convey this lease, or let the said premises to any other person; and shall leave the same in like good order, unavoidable accidents, and ordinary wear and tear, excepted.

[L. s.]

Signed, sealed, and delivered, }
in presence of }

[L. s.]

Warrant for Freeholders.

STATE OF SOUTH-CAROLINA, }
District of }

To any lawful Constable, or to the Sheriff of said District.

You are hereby commanded to summon the freeholders, whose names are in the pannel hereto annexed, to be and appear at in the and district aforesaid, on next, the day of at o'clock, to inquire upon their oaths, of and concerning a certain unlawful holding of all the , situated and lying , in the State and district aforesaid, by one tenant, over and against landlord, against the form of the statute, &c. And you are further commanded to summon the said , or any other person claiming or coming into possession under him, at the same time and in the same way, to appear at the same time and place, to shew cause, if any such lessee or other person may have, why possession of the premises aforesaid, shall not be forthwith restored to the said , his heirs or assigns.

Given under our hands and seals, at this day of A. D. one thousand eight hundred and

A. B. [L. s.]

Magistrate.

C. D. [L. s.]

Magistrate.

[Here annex the pannel of freeholders.]

Summons to Defendant.

STATE OF SOUTH-CAROLINA, }
District of }

THE STATE, ex. rel.

vs.

} In Magistrates Court.

} Tenant holding over Landlord.

To

You are hereby summoned to appear, before a Court of Magistrates and Freeholders, to be holden at , on next, the day of , at o'clock, to shew cause, if any you have, why possession of the premises, at , in the district and State aforesaid, now unlawfully held by you, over and against , your landlord, (as it is said) should not be forthwith restored to the said lessor, his heirs or assigns.

Herein fail not.

Given under my hand and seal at , this day of , A. D., one thousand eight hundred and , and in the year of American Independence.

A. B.
Magistrate. [L. s.]

Inquisition.

STATE OF SOUTH-CAROLINA, }	
District of }	
THE STATE, <i>ex. rel.</i> , }	
vs. }	Tenant holding over Landlord.

An inquisition, taken for and in behalf of , at , in the State aforesaid, on the day of , in the year of our Lord, one thousand eight hundred and , on the oaths of , good and lawful men of the district and state aforesaid, and , magistrates for the of , in the district and State aforesaid. We find that the lease from to has expired, and that is entitled to the immediate possession of the premises, now in the occupation of the said , that is to say. [*Here describe the premises.*] The same as the said now occupies, which said premises, the said tenant, doth unlawfully hold over against the said landlord, against the form of the statute, in such cases made and provided, and against the peace and dignity of the said State.

Given under our hands and seals, at , this day of , in the year of our Lord one thousand eight hundred and , and in the year of the independence of the United States of America. [*Then follow signatures of freeholders and seals.*]

Warrant of Restitution.

STATE OF SOUTH-CAROLINA, }	
District of }	
To	, Sheriff of the said District.

LAW OF MAGISTRATES.

Whereas, by an inquisition held before us at _____, in the district and State aforesaid, on the _____ day of _____, by the oaths of _____, twelve good and lawful men of the said district and State, it was found by the said freeholders, that _____ was entitled to the possession of the premises, situate [*here describe the premises,*] and now in the possession of _____. These are, therefore to authorize and require you forthwith to eject the said _____, and all and every other person whatsoever, in possession of the said premises, by or through the said _____, and to deliver to the said _____, his heirs and assigns, full possession of the same. You are also required, to levy of the goods and chattels of the said _____, the sum of _____ dollars, for the costs and charges, incurred in the said proceeding; and herein fail not, under the penalties that will fall thereon.

Given under our hands and seals, this _____ day of _____, A. D., 18

A. B.

[L. s.]

Magistrate.

C. D.

[L. s.]

Magistrate.

The Freeholders Oaths.

You shall true inquiry and presentment make, of all such things as shall come before you, concerning a certain holding over, said to have been lately made in the dwelling house of _____, at _____, in this district: you shall spare no one for favor or affection, nor grieve any one for hatred or ill will; but proceed herein according to the best of your knowledge, and according to the evidence that shall be given you. So help you God.

The oath that _____, your foreman hath taken on his part, you and every of you shall truly observe and keep on your parts. So help you God.

L A R C E N Y .

Simple or compound.

Larceny or theft is distinguished by the law into two sorts. 1st. Simple larceny or theft, unaccompanied by any other atrocious circumstances; and 2d. Mixed or compound larceny, in which there is the additional aggravation of taking from the house or person.

1st. Of Simple Larceny.

Simple larceny, either grand or petit.

Simple larceny may be either grand or petit larceny; formerly it was grand larceny, when the value of the goods stolen exceeded the

able of twelve pence, and petit larceny, when under that amount, but where, the amount in value of the goods stolen, which make a larceny either grand or petit, is usually fixed by the discretion of the jury.

These offences formerly were considerably distinguished in their punishment, but since the Acts of 1833 and 1834, abolishing branding ^{for} and substituting whipping and imprisonment in cases of grand larceny, the punishment of that offence, is the same as in petit larceny, except that in the former, for the second offence, the punishment is death, without clergy.

Simple larceny is the felonious taking and conveying away, the ^{Definition.} personal goods of another.

1st. OF THE TAKING.

2d. OF THE CARRYING AWAY.

3d. OF THE INTENT.

4th. AS TO THE GOODS OF WHICH LARCENY MAY BE COMMITTED.

5th. AS TO THE OWNERSHIP.

1st. Of the Taking.

It must be a taking. This implies the consent of the owner to be lent. Therefore, no delivery of the goods from the owner to the lender, upon trust, can ground a larceny. As if A. lends B. a horse, and he rides away with him; or, if I send goods by a carrier, and he carries them away; these are no larcenies. But if the carrier opens a bale or pack of goods, or pierces a vessel of wine, and takes away part thereof, or if he carries it to the place appointed, and afterwards takes away the whole, these are larcenies; for here, the intent to steal is manifest; since, in the first case, he had otherwise no right to open the goods; and, in the second, the trust was determined, the delivery having taken its effect. But, bare non-delivery is not of course to be intended to arise from a felonious design; since it may happen from a variety of other incidents. Neither by the common law was it larceny in any servant to run away with the goods committed to him to keep, but only a breach of civil trust. But if he takes the possession, but only the care and oversight of the goods, as a butler of the plate, the shepherd of sheep, and the like, the embezzling of them is felony at common law. So, if a guest robs his inn, or a tavern, of a piece of plate, it is larceny: for he hath not the possession delivered to him, but merely the use, and so it is declared to be by statute 3 and 4 W. and M., c. 9, if a lodger runs away with the beds from his ready furnished lodgings. 4th B. C., 230.

Where the taking is by finding, it will not amount to larceny, even though there be the intent to steal. But this doctrine must be understood with great limitation.

There is one case in which it has been holden, that the taking will not amount to a larceny, though it be accompanied with the intent to steal; namely, where the taking is by a finding of the property. Thus, it is laid down in the books, that if one lose his goods and another find them, though he convert them, with an intent to steal, to his own use, yet it is no larceny, for the first taking was lawful. And again, if A. find the purse of B. in the highway, and take it and carry it away, with all the circumstances that usually prove the intent to steal, as denying it, or secreting it, yet it is not felony. But though, where the particular circumstances of any case furnish a presumption of an intended dereliction of treasure trove, or waif, or stray on the part of the owner, no larceny can be committed by taking them before seizure by the lord; yet, in other cases, the doctrine of a taking, by finding, must be admitted with great limitation, and must be understood to apply only where the finder really believes the goods to have been lost by the owners, and does not color a felonious taking under such a pretence. 2 Russell, 101.

Thus, where the prisoner found a sum of money on the highway, which he soon after converted to his own use, with various circumstances of fraud and concealment,—it was held, “that if the prisoner, at the time of finding the pocket-book, and before he removed the money, knew it to be the property of the prosecutor,” the conversion, under these circumstances, would be larceny. *State vs. Ferguson*, 2d M’Mullan, 502.

Cases of hackney coachmen taking articles left in their coaches.

The following cases also further show that the taking *animo furandi* of goods which have been found by the party, may amount to larceny. A gentleman left a trunk in a hackney coach, and the coachman took and converted it to his own use. This was holden to be felony, on the ground that the coachman must have known where he took up the gentleman and his trunk, and where he set him down; and that he ought, therefore, to have restored it to him. In a late case, where the prisoner was indicted for stealing a box, containing a quantity of wearing apparel, and two bonds, it appeared that he was a hackney coachman, and that he took up the prosecutor with several trunks and packages, amongst which was the box in question, at an hotel in the Adelphi, and set him down in Orchard-street, Portman Square, where all the articles were taken out of the coach by the prisoner and the prosecutor’s servant, except this box, which was corded, and had been deposited under the seat of the coach. The prisoner received his fare and drove away, after which, in a few minutes, the box was missed; but the prisoner and the coach were quite gone; and it was

till several days had elapsed, and after handbills had been dispersed and advertisements inserted in the public prints, offering a reward to any person who should bring home the box, that the prisoner was apprehended. The box was then found at the house of a Jew, which the prisoner said he had taken it: but it was uncorded, the ends of it were forced off, and it contained only a part of the property which was in it when it was lost, the two bonds and several of the articles mentioned in the indictment having been taken away. The case was left to the jury, to consider whether they were satisfied that the prisoner had uncorded the box, not merely from a natural, though idle curiosity, but with an intention to embezzle some part of its contents; and they were of opinion, that he uncorded the box and destroyed the papers with an intent to embezzle the goods found in the box. They accordingly found him guilty; and the case being reserved for the consideration of the twelve judges, a majority of them were of opinion that the conviction was proper. 2d Russell, 101.

The doctrine as to a felonious taking of goods, which have been found by the party, was further confirmed in two more recent cases. In the first of these cases, it appeared that a pocket-book containing bank notes had been found by the prisoner in the highway, and afterwards converted by him to his own use. Upon which, Lawrence, J. observed, that if the party finding property in such manner knows the owner of it, or if there be any mark upon it by which the owner can be ascertained, and the party, instead of restoring the property, converts it to his own use, such conversion will constitute a felonious taking. And in the subsequent case, the two prisoners (father and son) were convicted of stealing a bill of exchange, upon evidence of their having found and converted it to their own use, by endeavoring to negotiate it. Gibbs, J., stated to the jury, that it was the duty of every man who found the property of another, to use all diligence to find the owner, and not to conceal the property (which was actually stolen) and appropriate it to his own use. 2d Russell, 102.

Cases of bank notes, &c., found by the prisoners, and converted to their own use.

A singular case occurred at no very distant period, of a conversion with a felonious intent, of a large sum of money found in a bureau, which had been delivered to a carpenter, for the purpose of being repaired. The point arose in the Court of Chancery upon the following facts. Ann Cartwright died possessed of a bureau, in a secret part of which she had concealed nine hundred guineas in specie. After her death, Richard Cartwright, her personal representative, sent the bureau to his brother Henry, who took it to the East Indies, and brought it back, without the contents of it being discovered. It

was then sold to a person named Dick, for three guineas, who delivered it to one Green, a carpenter, for the purpose of repairing it. Green employed a person named Hillingworth, who found out the money. Hillingworth received only a guinea for his trouble; but in consequence of his discovery, the whole sum of nine hundred guineas was secreted by Green, by Green's wife, and by one Elizabeth Sharpe, and converted to their own use. On these suggestions, Cartwright, the personal representative of the original owner of the bureau, filed a bill of discovery against Green and his wife, and Mrs. Sharpe, in which bill, Dick joined, but did not claim any of the money on his own account; and the defendants demurred to the bill, on the ground that an answer to the discovery sought might subject them to criminal punishment. After the argument upon this demurrer, the Lord Chancellor said, that the real question was, whether the bill charged a felony, and that the distinctions upon that point were so extremely nice, that he should not trust himself to say any thing upon them until he had seen all the cases, and consulted some of the judges. Some time afterwards his Lordship delivered his opinion and said—"I have looked into the books, and have talked with some of the judges, and others; and I have not found in any one person a doubt that this is a felony. To constitute felony, there must, of necessity, be a felonious taking. Breach of trust will not do. But from all the cases in Hawkins, there is no doubt that this bureau being delivered to Green, for no other purpose than to repair, if he broke open any part which it was not necessary to touch for the purpose of repair, with an intention to take and appropriate to his own use what he should find, that is a felonious taking, within the principle of all the modern cases; as not being warranted by the purpose for which it was delivered. If a pocket-book, containing bank notes, were left in the pocket of a coat sent to be mended, and the tailor took the pocket-book out of the pocket, and the notes out of the pocket-book, there is not the least doubt that it is a felony. So, if the pocket-book was left in a hackney coach, if ten people were in the coach in the course of the day, and the coachman did not know to which of them it belonged, he acquires it by finding it certainly; and not being intrusted with it for the purpose of opening it, that is felony, according to the modern cases. Those with whom I have conversed upon this point, who are of very high authority, have no doubt upon it."—*Ibid.*

In cases of this nature, where the taking was by finding, some of the strongest circumstances to rebut the implication that such taking was felonious, will be those which show that the party made it known

he had found the property, so as to make himself responsible for value, in case he should be called upon by the owner; or those who show that he endeavoured to discover the true owner, and kept goods till it might reasonably be supposed that the true owner not be found.—Ib.

On some of the doctrines relating to the felonious taking, &c., Cases where the taking is by the delivery or consent of the owner, etc. have been already mentioned, points of considerable difficulty sometimes occur; but by far the most nice and intricate questions upon the class of cases which are now to be considered, namely, in which it appears that the goods were taken by the delivery or consent of the owner, or of some one having authority to deliver. The material ingredients in the definition of larceny, already mentioned, must still be kept in mind; particularly that of the *animus domini*, and the doctrine that the goods must be taken "*invito domino*." ss., 106.

It may, in the first place, be observed, with respect to these cases where the goods are obtained by delivery, that if it appear that, though there is a delivery by the owner in fact, yet there is clearly a change of property nor of legal possession, but the legal possession remains exclusively in the owner, larceny may be committed by as if no such delivery had been made.—Ib.

Thus, if a person, to whom goods are delivered, has only the bare charge or custody of them, and the legal possession remains in the owner, such person may commit larceny, by a fraudulent conversion of goods to his own use, a doctrine which directly applies to the case of servants entrusted with the care of goods in the possession of masters. And larceny may be committed also in a like manner by a person who has a bare special use of goods. Thus, a man may be guilty of larceny in taking a piece of plate, set before him to drink at a tavern; for he has only a liberty to use, not a possession by delivery. So if a weaver, or silk-thrower, deliver yarn, or silk, to be wrought by journeymen, in his house, and they carry it away with intent to steal it, this is felony; the entire property remaining there in the owner, and the possession of the workmen, being the possession of the owner. But it would not be felony if the yarn had been delivered to a weaver out of the house, who, having thus the lawful possession of it, had afterwards embezzled it; because, by the delivery, it had become a special property, and not a bare charge; in the same manner as when a person who is entrusted with the care of a thing for another to keep is used. 2d Russ., 107.

In a case where the prisoner was a lodger, and his land-lady wanted

Campbell's case. A landlady sends her servant to a lodger with a bank note, requesting him to change it, and he goes away with it; held to be larceny.

ing change for a bank note, sent it by her servant, to the prisoner up stairs, begging that he would give her change for it; when the prisoner, after examining his purse, said that he had not gold enough about him for the purpose, but that he would go immediately to his bankers and get the note changed; upon which he left the house, with the bank note in his hand, and never returned; the prisoner appears to have been convicted without any question having been made as to the offence amounting to larceny. But, in this case, it probably might have been considered that the land-lady did not intend to part with the note without first receiving the change; and if so, that the servant delivered the note to the prisoner without the authority of her mistress, and therefore, that no legal possession of it ever passed to the prisoner; and that in taking it, he was guilty of a trespass. 2 Russ., 105.

Delivery, where the owner remains present.

It has been suggested as worthy of consideration, whether the distinction concerning the legal possession remaining in the owner, after a delivery in fact to another, do not extend to all cases where the thing so delivered for a special purpose, is intended to remain in the presence of the owner. And it is well advanced, in support of the observation, that in cases of this kind, the owner cannot be said to give any credit to, or repose confidence in, the party in whose hands it is so, in fact, placed; and that, the thing being intended to be returned to the owner again, and resumable by him every moment, his dominion over it is as perfect as before; and the person to whom it is so delivered, has, at most, no more than a bare limited use, or charge, and not the legal possession of it. And though the case of a person going into a shop, under pretence of buying goods, and, upon their being delivered to him to look at, running away with them; and also that of a person going into a market, and obtaining a horse, for the purpose of trying its paces, and then riding away with it, have been considered as felonious, on the ground of a preconcerted design to steal the chattels; yet they appear also to be sustainable on the ground that the legal possession of such chattels still remained in the owner of the goods, notwithstanding the delivery, he continuing present.—Ib.

Delivery, where the owner parts with the property in the goods taken.

It may be further observed, as clearing the ground of inquiry, concerning these cases of a delivery of the goods by the owner, that it is a settled and well established principle, that if the owner part with the property in the goods taken, there can be no felony in the taking, however fraudulent the means by which such delivery was procured. The following are some of the cases in which it has been

that the owner had parted with the property in the goods, by every of them to the prisoner. Upon an indictment for horse it appeared that the prosecutor was at a fair, having a horse the care of a servant, which he intended to sell, when he was met by the prisoner, to whom he was personally known, and who said to him, "I hear you have a horse to sell; I think he will suit my purpose, and if you will let me have him a bargain, I will buy him." The prisoner and the prosecutor then walked together into the fair, and the prisoner rode away with the horse from a fair, after it was sold to him, without paying the purchase money. The prosecutor then walked together into the fair, the horse, and, upon a view of him, the prosecutor said to the prisoner, "you shall have the horse for eight pounds;" and calling to him, he ordered him to deliver the horse to the prisoner. The prisoner immediately mounted the horse, saying to the prosecutor that he would return immediately, and pay him. The prosecutor replied, "I will wait for you." The prisoner rode away with the horse, and never returned. Upon these facts, the learned judge, by whom the prisoner was tried, directed an acquittal, on the ground that there was a contract of sale and delivery, and that the property, as well as possession, was entirely parted with. 2 Russ., 109.

Harvey's case. The prisoner, with a fraudulent intent to obtain money, ordered a tradesman to send him some, to be paid for on delivery. Upon the goods being sent accordingly, gave the servant some forged bills, which were mere fabrications, and of no value. It was holden not to be larceny, on the ground that the prisoner parted with the property by accepting such payment as was though his master did not intend to give the prisoner credit. 110.

Molton's case. The prosecutor having been inveigled by sharps with them, and suffered by them to win in the first instance, afterwards stripped of a large sum, by losing a bet; and the whole transaction was found by the jury to have been a preconcerted design to get the prosecutor's money; but it was holden not to be a taking, as the prosecutor parted with the property in his own under an idea that it had been won fairly.—Ibid, 111.

Man's case. The same rule will prevail, though the name of another person be used to procure a delivery by the owner. So where silver was so obtained, it was holden not to be felony.—3.

Smith's case. Held under the particular circumstances, that as no fraud was used to induce the prosecutor to deliver a check, as no larceny of the check, although the prisoner intended to use the proceeds before he received the check, and did mis-

Harvey's case. The prisoner rode away with a horse from a fair, after it was sold to him, without paying the purchase money.

Obtaining possession by false bills.

By concert to bet.

Using the name of another.

Obtaining a check without fraud.

apply them accordingly. And as to a charge of stealing the notes, which were the proceeds of the check, held under the particular circumstances, that the property in the notes never was vested in the prosecutor—Ibid, 114.

Delivery, where the owner does not part with the property, but only with the possession of the goods.

But if the owner has not parted with the property in the goods, but only with the possession of them, the question of larceny still remains open, and will depend upon the fact, whether, at the time of the alleged felonious taking, the owner had parted with the possession of the goods in such a manner, and to such an extent, as to exclude the idea of trespass. For if the owner of the goods parted with the possession of them without fraud practised by the taker, and if, after the owner had so parted with the possession of them, nothing was done to determine the privity of contract under which the taker had the possession of them delivered to him, no trespass, and therefore no larceny, can be committed by their conversion. Upon the subject, therefore, of larceny, where the owner or person authorized to dispose of the goods has parted with the possession of them by delivery to the party accused, the inquiry seems to resolve itself into two heads; first, whether the delivery was obtained fraudulently, with intent to steal the goods; and if the delivery were not so obtained, then, secondly, whether the lawful possession has been determined, and whether there has been any new and felonious taking. 2d Russell, 118.

Delivery, where it has been obtained fraudulently, with intent to steal the goods.

The cases in which it has appeared that the delivery of the goods was obtained fraudulently, and with intent to steal them, consist principally of transactions usually described by the term swindling, and which have been in most instances carried on by the common arts adopted on such occasions. In a few, however, the more aggravated proceeding has been adopted, of getting fraudulent possession of the goods by act of law.—Ib.

SHARPLESS & GEATRIX'S case. A hosier, by the desire of the prisoner, took a variety of silk stockings to his lodgings, where the prisoner pretended to purchase some of them, and set them apart from the rest, and then, having sent the hosier to fetch some more articles, decamped with the stockings; this was holden to be larceny. 2d Russ., 118.

By pretending to be another.

WILKIN'S case. Where the owner of goods sent them by his servant to be delivered to A, and the prisoner fraudulently procured the delivery of them to himself, by pretending to be A, it was holden to be larceny.—Ibid, 119.

AICKLES' case. The prisoner agreed with the prosecutor to dis-

at a bill of exchange for him, and the bill was delivered into the owner's hands. The prisoner then said, that if the prosecutor should come to his lodgings, he would give him the cash. The prosecutor did not go himself, but sent his clerk, whom he desired not to sight of the prisoner till he had got the money. The prisoner tried to get away from the clerk with the bill, and without paying money; and this was holden to be larceny, the jury finding a concerted design by the prisoner to get the bill into his possession with intent to steal it. 2 Russ., 121.

OLIVER's case. The prisoner offered to accommodate the prosecutor by giving him gold for bank notes, upon which the prosecutor put a number of bank notes for the purpose of their being so changed. The prisoner took up the notes and made away with them. And this was holden to be larceny, if the jury believed that the prisoner intended to run away with the notes, and not to return the gold. 2 Russ., 122.

So where it appeared that the prisoners decoyed the prosecutor to a public house, and there introduced the play of cutting cards, that one of them prevailed upon the prosecutor, (who did not play on his own account) to cut the cards for him, and then under pretence that the prosecutor had cut the cards for himself, and had lost, another of them swept his money off the table and went away with it; it was considered to be one of those cases which should be left to the jury to determine *quo animo* the money was obtained, and which would be felony, in case they should find that the money was obtained under a preconcerted plan to steal it. So if there is a plan to cheat a man of his property under color of a bet, and he parts with possession, only to deposit as a stake to one of the confederates, taking by such confederate is felonious. The prosecutor was induced to deposit twenty guinea notes on a bet, that one of the prisoners could not guess right three times successively on the hiding of a half-penny by another of the prisoners under a pot; he put the notes in the hands of one of the prisoners, and then the other guessing right, the notes were handed over. The question was left to the jury, whether, at the time the notes were taken, there was not a plan between the prisoners that they should be kept under the false color of winning a bet; and the jury so found. Upon a case reserved, the judges, (ten of them being present,) held, that the conviction was not good, because at the time of the taking, the prosecutor parted with possession only. 2 Russ., 123.

ATCH's case. The prisoner, with some accomplices, being in

company with the prosecutor, pretended to find a valuable ring. The prosecutor was to have a share of the pretended value of it, and was prevailed upon to deposit his watch, &c., and to take the ring until his share of the value should be paid. The accomplices of the prisoner made off with the watch, &c., and the ring proved to be of the value only of ten shillings. It was left to the jury to say whether this was done with a preconcerted plan to obtain the watch, &c., and the prisoner was found guilty. 2 Russ., 124.

MOORE'S case. Where the prisoner induced the prosecutor to deliver twenty guineas and four doubloons, by way of pledge for a counterfeit jewel, pretended to be found, with intent to steal the money, it was holden to be larceny.—*Ib.*, 125.

Persons
acting in
concert.

If several act in concert to steal a man's goods, and he is induced by fraud to trust one of them in the presence of the others, with the possession of the goods, and then another of the party enticed the owner away, in order that the party who has obtained such possession may carry the goods away, all will be guilty of felony, the receipt by one under such circumstances being a felonious taking by all.—*Ibid.*, 27.

Delivery of
goods
obtained by
the fraudulent
abuse
of legal
process.

A delivery of goods obtained by a fraudulent abuse of legal process, has been already mentioned as amongst the most aggravated of these cases of larceny, where the taking is effected by procuring a delivery of the goods from the owner, or other person authorized to dispose of them. It will generally be a matter of some difficulty to give satisfactory proof of a felonious intent in such a transaction; but if the offence be proved, the severest punishment which it can receive may well be inflicted; for it has been justly observed, that such an offence converts the process of the law, which is the best security for property, into an instrument of rapine and plunder. The books do not furnish many instances of larcenies of this description. But it is laid down, that if a person, intending to steal a horse, take out a replevin, and having thereby procured the horse to be delivered to him by the sheriff, ride him away; or if a man, intending to steal the goods of another, fraudulently deliver an ejectment, and by obtaining judgment against the casual ejector, get possession of his house, and take his goods; in both these cases, the taking will amount to larceny.—*Ibid.*, 130.

Delivery of
the goods
obtained
without
fraud, and
question

Where it appears that the delivery of the goods by the owner, or person authorized to dispose of them, was not obtained fraudulently, and with intent to steal, a remaining inquiry may be: whether such lawful possession has been determined, and whether there has been

new and felonious taking. Thus it has been held, that if a carrier take a pack of goods to the place appointed, and deliver or lay down, his possession is determined; and if he afterwards carry it away with intent to steal it, this will be a new taking, and felonious. whether there has been a new and felonious taking. If the lawful possession has not been determined, the goods will continue in the possession of the party to whom they were delivered by will; and the general principle of law will prevail, "that if a person obtain the goods of another without fraud, although he have an *animus furandi* afterwards, and convert them to his own use, he cannot be guilty of felony." A principle, which has been holden to extend to the cases of a tailor, who has cloth delivered to him to make clothes with; a carrier who receives goods to carry to a certain place; and a friend who is entrusted with goods to keep for the use of the owner; which they afterwards severally embezzle. And so, if plate be delivered to a goldsmith to work or to weigh, or as a deposit, it has been said that his conversion of it will not be a felony. It has, however, been already noticed, that some of the cases of this nature seem to make a near approach to those where a mere charge, or mere special use* of the goods, is transferred by the delivery, and where, consequently, the legal possession of them remains exclusively in the owner, larceny may be committed in respect of them, exactly as if no delivery at all had been made. 2 N. S., 131.

It appears always to have been considered, that where a horse was delivered upon hire or loan, and such delivery was obtained *bona fide*, Delivery of a horse, etc. upon hire, or loan, bona fide. subsequent wrongful conversion pending the contract would amount to felony; and so of other goods. But it was at one time held, that when the purpose of the hiring or loan, for which the delivery was made, had ended, felony might be committed by a conversion of the goods; and, consequently, that if the hiring of a horse was limited to a particular time or place, and after that time had expired, or the party had arrived at the proper place for the re-delivery, he rode away with the horse, and converted it to his own use, it was larceny. This doctrine was considered, and held to be wrong, in a case of recent occurrence. The prisoner had borrowed a horse, to take a child to a neighboring surgeon, and after he had done so, and returned, took the horse in a different direction and sold it. The jury were satisfied that he had no felonious intention when he borrowed it; but the purpose for which he hired it was over before he took the horse to the place where he sold it, the jury were directed to convict, on the order that the point might be considered; and upon the case

reserved, the judges held, that there was no felonious taking, and that the conviction was wrong. So that it is now settled, that where the owner parts with the possession of goods for a special purpose, and the bailee, when that purpose is executed, neglects to return, and afterwards disposes of them, if such bailee had not a felonious intention when he originally took the goods, &c., subsequent withholding and disposing of them, will not constitute a new felonious taking, nor make him guilty of felony.—Ib., 132.

Privy of contract determined, after delivery, by the tortuous acts of the bailee.

The privy of a contract may be determined before its regular completion by the tortuous acts of the bailee. A. delivers the key of his chamber to B., who unlocks the chamber and takes the goods of A., with intent to steal them. This has been holden to be felony, for the reason that the goods were not delivered to B., but taken by him; a judgement which appears to have proceeded upon the ground that, by the delivery of the key in this case, it was not in the contemplation of the parties to make a delivery of the goods contained in the room. But supposing the key to have been delivered for the purpose of entrusting the party with the care of the goods, still, according to a very good opinion, the taking of the goods out of the room, with a felonious intent, might have been felony; on the ground that, by the act of taking the goods with such an intent out of the room in which they were intended to remain for safe custody, the privy of the contract would have been determined in the same manner as if they had been delivered in a box, and taken out of it afterwards. 2d Russ., 132.

Carrier, weaver, etc. taking the goods delivered to them.

Upon the same principle of a determination of the privy of contract, by a tortuous act of the bailee, it has been holden, that if a carrier open a pack and take out part of the goods, or a weaver take part of the silk which he has received to work, or a miller take part of the corn which has been delivered to him to grind, such takings, if with a felonious intent, will be felony. And in a more recent case, it was held, that where a warehouse-man took all the wheat out of certain bags which had been delivered to him for safe custody, and disposed of it, he was guilty of larceny. The prisoner had received forty bags of wheat to keep in his warehouse for one Neale; having no authority to sell, or to show samples; he emptied eight of the bags, and sold the wheat they contained, and afterwards filled the bags with inferior wheat; but as it did not appear that he had taken less than the whole of any one bag, the point was saved, whether any larceny had been committed, and the judges were unanimous that this was a larceny, and that taking the whole out of any one bag, was not less a larceny than taking a part.—Ibid, 134.

With respect, however, to a conversion of goods by a carrier, a Distinction in the carrier's case. table distinction should be observed, namely, that though if a carrier, to whom a package of goods is delivered, to take to a certain place, open the package and take out part of the goods, it will be a felonious taking; yet it will be no felony if he take away the whole package. The doctrine seems, indeed, to savor a little of contradiction, and has been considered as standing more upon positive law not this time to be questioned, than sound reasoning. The distinction appears to have proceeded upon the ground, that the act of breaking a package is an act of trespass in the carrier, by which the privacy of contract is determined; whereas, if there be no breaking of the package, no severance of part of the commodity from the rest by the carrier, but the whole of it be parted with by him in the state in which was delivered to his hands, there will be nothing which will amount to a trespass while the package remains in his possession. And if this be the true principle of the distinction, it does not seem to make any difference, where there is such a breaking of the package, whether the carrier take the whole or a part only of its contents.—Ibid, 135.

21. Of the Carrying Away.

There must not only be a taking, but a carrying away; *cepit et portavit*, was the old law latin. A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation or carrying away. As if a man leading another's horse out of a close, and be apprehended in the act; or if a guest, stealing goods out of an inn, has removed them from his chamber down stairs; these have been adjudged sufficient carryings away, to constitute a larceny. For, if a thief, intending to steal plate, takes it out of a chest, in which it was, and lays it down on the floor, but is surprised before he can make his escape with this is larceny. 4th B. C., 231. Must be a removal.

But a very slight asportation will suffice. Thus, to snatch a diamond from a lady's ear, which is instantly dropped among the curls of her hair; to remove sheets from a bed, and carry them into an adjoining room; to take plate from a trunk, and lay it on the floor, with intent to carry it away; and to remove a package from one part of a wagon to another, with a view to steal it; have respectively been held to be felonies; and where a prisoner had lifted up a bag from the bottom of a boot of a coach, but was detected before he had got it out, it did not appear that it was entirely removed from the space it first occupied in the boot, but the raising it from the bottom had

completely removed each part of it from the space that specific part occupied; this was held a complete asportation. 4th B. C., 232. (Note.)

3d. Of the Intent.

Must be felonious.

One of the most material considerations respecting the taking and carrying away of goods necessary to constitute larceny, is, whether the fact were done *animo furandi*—"cum animo dico, quia sine animo furandi non committitur." The ordinary discovery of such felonious intent is where the party commits the fact clandestinely, or, upon its being laid to his charge, denies it; but this is by no means the only criterion of criminality; for in cases that may amount to larceny, the variety of circumstances is so great, and the complication thereof so mingled, that it is impossible to recount all those which may evince a felonious intent, or *animum furandi*. It is useful to refer to those points which have already come under consideration: but new cases will continually occur, in which the felonious intent must be left, upon the particular circumstances, to the due and attentive consideration of the Court and jury, who will not forget the excellent rule, that in doubtful cases it is proper rather to incline to acquittal than conviction. 2d Russell, 97.

Cases, where the taking is only a trespass.

It is clear that the taking, though wrongful, may only amount to a trespass. Thus, if a man takes away the goods of another, openly before him or other persons, otherwise than by apparent robbery, this carries with it an evidence only of a trespass, because done openly in the presence of the owner or of other persons who are known to the owner. And the evidence of its being only a trespass will be strong, where a person, having possessed himself of the goods of another, avows the fact before he is questioned. Again, if a man leaves a harrow or plough in a field, and another person who has land in the same field uses those instruments, and having done with them, either returns them to the place where they were, or acquaints the owner with his having taken them, this is no felony, but at most, a trespass. And the same conclusion must be drawn where a man, having cattle upon a common which he cannot readily find, takes his neighbor's horse which is depasturing on the common, rides about upon it to find his cattle, and, when he has done with it, turns it again upon the common. But the case will not be so clear where the property is taken without the privity or leave of the owner, and no intention to return it is manifested by the party by whom it is taken.—Ibid.

PHILLIPS & STRONG's case. The prisoners took two horses from a

able, rode them to a place at a considerable distance, and there left them, proceeding on their journey on foot; and the jury having found that the horses were taken by the prisoners only in order to ride them and afterwards leave them, it was holden to be trespass, and not larceny.—Ibid.

Clandestinely taking away articles in order to induce the owner, a girl, to fetch them, and thereby to give the party an opportunity to elicit her to commit fornication with him, is not a felonious taking. The prisoner took from a house, in the night, a young girl's bonnet, and some other articles of her dress, and carried them to a hay-mow, where he had twice had connexion with her; and the jury thought that he only took them in order that she might again go to the mow, and that he might have another opportunity of soliciting her to repeat the connexion. Upon a case reserved, the judges thought the taking with such an intent was not felonious, and the prisoner was pardoned. Ibid, 98.

A taking of another's property may also be by mistake, arising from heedlessness or accident, in which the *animus furandi* has no part. Thus, if the sheep of A. stray from his flock to the flock of B., and B. drive them along with his own flock, and, by mistake, without knowing or taking heed of the difference, shear them, it is no felony. But if B. knew them to be the sheep of another person, and tried to conceal that fact; if, for instance, finding another's mark upon them, he defaced it, and put his own mark upon them, this would be evidence of felony. And a like conclusion may be drawn, where a party, having possession of another's property, appears desirous of concealing it, or of preventing the inspection of the owner, or of any person who may make the discovery; or where, being asked, he denies having the property, though it is clear that he knew of its being in his possession. On the other hand, a mode of conduct, of a different description, in these several respects, will be evidence to rebut any felonious intent. Ibid.

The circumstance of the goods being taken on a claim of right, may also negative any *animus furandi*. In one instance, indeed, a man may be guilty of felony in taking his own goods; namely, where having bailed them to another person, he afterwards steals them from such person in order to charge him for them in an action, or robs the other person of them in order to charge the hundred. But regularly, a man cannot commit felony of goods wherein he has a property. Thus, if A. take away the trees of B., and cut them into boards; or, A. take the cloth of B., and make it into a doublet, B. may take

the boards or the cloth, and it will not be felony. So, if A. take the hay of corn of B., and mingle it with his own heap or cock, or take B's cloth, and embroider it; B. may retake the whole heap of corn or cock of hay, (at least so much of them as cannot be easily distinguished from his own,) and the garment with the embroidery; and such retaking will be no felony.—Ibid, 99.

4th. As to the Goods of which one may commit Larceny.

By the common law, larceny cannot be committed of things that are a part of the freehold.

By the common law, larceny cannot be committed of things which savor of the realty, and are, at the time they are taken, a part of the freehold; whether they are of the substance of the land, as lead, or other minerals; of the produce of the land, as trees, corn, grass, apples, or other fruits; or things affixed to the land, as buildings, and articles, such as lead, &c., annexed to buildings. The severance and taking of things of this description is, at common law, only a trespass. One reason for which doctrine (though it does not apply to the whole of the articles which have been enumerated,) is said to be that things which are a part of the freehold, being usually more difficult to remove, are less liable to be stolen: possibly also, the doctrine may have proceeded upon certain subtleties in the legal notions of our ancestors: and it may, perhaps, in some measure, have originated in the greater security from private depredations of the things which were part of the freehold, than of those which were merely personal, in the earlier times, when articles of provision and other personal chattels, (frequently the most valuable) were carried from place to place by the individual tenants, in that attendance in the camp which was exacted by their military tenures. 2d Russell, 136.

But they become the subjects of larceny by being severed

But things, though they savor of the realty, may become the subjects of larceny by being severed from the freehold; thus, if stones be dug out of a quarry, wood be cut, fruit be gathered, or grass be cut, larceny may be committed of them; and this will be the case, not only when they have been severed by the owner, but also by the thief himself, if there be an interval between his severing and taking them away; so that it cannot be considered as one continued act. If therefore the thief sever them at one time, whereby the trespass is completed, and they are converted into personal chattels, in the constructive possession of him on whose soil they are left or laid, and come again at another time, when they are so turned into personality, and take them away, it is larceny. Thus, though "if a thief severs a copper, and instantly carries it off, it is no felony at common law; yet if he lets it remain after it is severed, any time, then the removal of it

becomes a felony, if he comes back and takes it: and so of a tree which has been some time severed."—*Ib.*, 137.

By Act of 1826, if any person shall take from any field not belonging to such person, any cotton, corn, rice, or other grain, fraudulently, with an intent secretly to convert the same to the use of such person taking the same, such person so offending shall be guilty of larceny, either grand or petit, as the value of the property may be. 6th S. c., 284. Stealing corn, etc., from the field.

If any person or persons shall steal, or take by robbery, any bond, warrant, bill or promissory note, for the payment or securing the payment of any money, being the property of any other person or persons, or of any corporation, notwithstanding any of the said particulars are termed in law a chose in action, it shall be deemed and construed to be felony, of the same nature and in the same degree, and with or without the benefit of clergy, in the same manner as it would have been if the offender had stolen or taken by robbery, any other goods of the like value with the money due on such bill, bond, warrant or note, or secured thereby, and remaining unsatisfied; and each offender shall suffer such punishment as he or she should or might have done, if he or she had stolen other goods of the like value with the moneys due on such bond, warrant, bill or note, respectively, secured thereby and remaining unsatisfied; any law to the contrary thereof in any wise used notwithstanding. 3d S. L., 470. Bonds, notes, or choses in action.

Bank bills are such securities for payment of money, as shall be included under the words "bill or promissory note," of the A. A. c. 136-7; and are subjects of larceny, under the same; and the taking thereof shall not be by robbery. *State vs. Casados*, 1st N. & M'C., 91. Bank bills.

With regard to domestic animals, such as horses, oxen, sheep, and swine, &c. like, there is no doubt whatever that they were the subjects of larceny at common law. Domestic birds also, as ducks, hens, geese, turkeys, peacocks, &c., are clearly the subjects of larceny. So also larceny may be committed of their eggs or young ones. 2d Russell, 150. Domestic animals.

And as the stealing of such animals is larceny, it is also larceny to steal the produce of them, though taken from the living animals. Upon this ground it was holden by all the judges, on a case reserved for their opinion, that milking a cow at pasture, and stealing the milk, was larceny. And it has also been holden, that larceny may be committed by pulling wool from the bodies of live sheep and lambs, without a felonious intent.—*Ib.* And their produce.

Where the animals or other creatures are not domestic, but are

Animals,
etc., *feræ*
naturæ,
reclaimed or
dead.

feræ naturæ, larceny may, notwithstanding, be committed of them, if they are fit for the food of man, and dead, reclaimed, and known to be so, or confined. Thus, if hares or deer be so enclosed in a park, that they may be taken at pleasure; or fish in a trunk or net, or as it seems in any other enclosed place which is private property, and where they may be taken at any time, at the pleasure of the owner; or pheasants and partridges be confined in a mew; or pigeons be shut up in a pigeon house; or swans be marked and pinioned, or (though unmarked) be kept tame in a mote, pond or private river; or if any of these creatures be dead, and in the possession of any one; the taking of them with felonious intent will be larceny.—Ib., 151.

Animals,
etc., unre-
claimed.

But a different doctrine prevails with respect to animals and other creatures *feræ naturæ*, which are unreclaimed: as it is considered that no person has a sufficient property in them to support an indictment for larceny. Thus, larceny cannot be committed of deer, hares, or conies, in a forest, chase or warren; of fish in an open river or pond; of wild fowls, when at their natural liberty; of old pigeons, out of the dove house, or even of swans, though marked, if they range out of the royalty, because it cannot be known that they belong to any person. But larceny may be committed of the flesh or skins of any of these or other creatures fit for food, when they are killed; because they are then reduced to a state, in which a right of property in them may be claimed and exercised.—Ib.

Animals of
a base
nature.

There is yet another kind of animals to be noticed; namely, those which, though they may be reclaimed, are not such of which larceny can be committed by reason of the baseness of their nature. Some animals, which in this country are now usually tame, come within the class in question; as dogs and cats. And others which, though wild by nature, are often reclaimed by art and industry, clearly fall within the same rule; as bears, foxes, apes, monkees, polecats, ferrets, and the like. The reason upon which this doctrine appears originally to have proceeded, is, that creatures of this kind, for the most part wild in their nature, and not serving, when reclaimed, for food, but only for pleasure, ought not, however the owner may value them, to be so highly regarded by the law, that for their sakes a man should die. And the doctrine extends to the whelps, or young of such animals; the rule being established, that where no felony can be committed of any creatures that are *feræ naturæ*, though tame or reclaimed, it cannot be committed of the young of such creatures in the nest, kennel, or den.—Ib., 153.

5th. *As to the Ownership.*

Joint tenants, or tenants in common, have not an ownership, as against each other, upon which an indictment for larceny can be sustained. 2d Russ., 154.

Nor has a husband such an ownership of his goods as against his ^{Husband and wife.} wife, that she or any one, by her delivery, may commit larceny of them.—Ib., 155.

A man may, under particular circumstances, be guilty of larceny in stealing his own goods, as he may of robbery in taking his own property from the person of another. If A. bail goods to B., and afterwards *animo furandi* take the goods from B., with an intent to charge him with the value of them, it is felony. And so if A., having delivered money to his servant to carry to some distant place, disguise himself, and rob the servant on the road, with intent to charge the indred with the loss, according to the provisions of the statute, it will be robbery in A. For as against persons so taking even their own goods with a wicked and fraudulent intent, there is a sufficient temporary special property in the bailee or servant, to support an indictment.—Ib.

The real owner of goods will not be deprived either of the property or possession in law of them by a felonious taking. If, therefore, A. steal the goods of B., and afterwards C. steal the same goods from A., in such case C. is a felon, both as to A. and as to B., and he may be indicted for stealing the goods of B. Upon this subject, Gould, in delivering the opinion of the twelve judges in a modern case, said, "it is a rule of law equally well known and established, that the possession of the true owner cannot be divested by a tortuous taking; and therefore, if a person unlawfully take my goods, and a second person take them again from him, I may, if the goods were feloniously taken, indict such second person for the theft, and allege in the indictment, that the goods are my property; because these acts of theft do not change the possession of the true owner." And he further stated to be his opinion, that the doctrine would also hold, where the goods were taken from the possession of the true owner by means of fraud; otherwise a man might derive an advantage from his own wrong. But a distinction is taken in the following case. If A. steals the horse of B., and afterwards delivers it to C., who was no party to the first stealing, and C. rides away with it *animo furandi*, yet C. is no felon to B.; because, though the horse was stolen from B., yet it was stolen by A., and not by C., for C. did not take it;

A man may in certain cases, be guilty of larceny, in taking his own goods from a bailee.

The ownership will not be divested from the true owner by an intermediate tortuous taking.

neither is he a felon to A., for he had it by his delivery. 2d Russell, 156.

Ownership sufficient, where there is only a special property in the goods.

There is no doubt that there may be a sufficient ownership of the goods stolen, in a person who has only a special property in them; and that they may be laid as the goods and chattels of such person in the indictment. A lessee for years, a bailee, a pawnee, a carrier, and the like, have such special property; and the indictment will be good, if it lay the property of the goods, either in the real owners, or in the persons having only such special property in them. So where goods belonging to a guest at an inn are stolen, they may be laid to be the property either of the inn-keeper or the guest. And linen stolen from a washer-woman, by whom it was taken in to wash in the course of her business, may be laid as her goods. In cases of this kind it is considered that the parties have a possessory property; being answerable to their employers, and being capable of maintaining an appeal of robbery or larceny, and having restitution. It has also been holden, that an agister of cattle has such a special property in them, that they may be laid as his goods in the indictment. When this case was referred to the judges, after the conviction of the prisoner, there was at first some doubt upon the point; one of the judges observing that an agister of cattle is not liable for them at all events, like an inn-keeper for the goods of his guest: but ultimately all the judges agreed that the conviction was right.—*Ib.*, 157.

Ownership of the clothes etc., of children.

Clothes and other necessities provided for children by their parents, are often laid to be the property of the parents, especially while the children are of tender age; but it is holden good either way. There are cases, however, of exclusive property in the children. Thus, in a case where the prisoner was charged with stealing wearing apparel, the property of John Wilson, and it appeared in evidence that the wearing apparel had been furnished by John Wilson to his son George, and that the son was nineteen years of age, and bound apprentice to his father, who had covenanted to find him in clothing; the Court held that the indictment was defective, and that the wearing apparel was exclusively the property of the son, who had been furnished with it in pursuance of the condition of the indentures.—*Ib.*, 160.

Ownership where the person of the owner is unknown.

But further, it is well settled that larceny may be committed by stealing goods, the owner of which is not known; and that it may be stated in the indictment that the things stolen were the goods of a person to the jurors unknown. But upon prosecutions of this kind, some proof must be given sufficient to raise a reasonable presumption that the taking was felonious, or *invito domino*; and Lord Hale, C.

, said that he never would convict any person for stealing the goods *jusdam ignoti*, merely because the person would not give an account of how he came by them, unless there were proof made that a felony had been committed of those goods. It is said, therefore, with respect to these cases, that the true ground upon which persons so indicted, may, in any instance, claim to be acquitted, when the other facts necessary to constitute the crime of larceny, appear upon the evidence, seems to be a want of the proper proof that the taking was felonious, or *invito mino*, and not the want of any property in the true owner, who, by selling his goods, does not lose his property in them until seizure by some other person having a right to seize in such cases. 2d Russ., 162.

It should be well observed, however, with respect to prosecutions for stealing goods of a person unknown, that an indictment, alleging the goods to be the property of a person unknown, will be improper if the owner be really known; and that in such case, the prisoner must be discharged of the indictment so framed, and tried upon a new one, for stealing the goods of the owner by name. In a case, where the prisoner was charged with stealing a box of goods from a stage-coach, the substance of the counts of the indictment, which stated the box to be the property of persons unknown, was rejected by the Court, on the ground that where it was in the power of a pleader to state a legal proprietor, as in this case, by laying the property to be in the persons from whom and to whom the goods were sent, it was improper to lay the property as belonging to persons unknown.—*Ibid*.

An indictment cannot be sustained for stealing the goods of a person unknown, if it appear that the owner is really known.

Mixed or compound larceny, is such as has all the properties of simple larceny, but is accompanied with either one or both of the aggravations of a taking from one's *house* or *person*. 4th B. C., 241. Larceny from the *house* having already been treated of under the head of house-breaking, we proceed to consider larceny from the *person*, which is either, 1st., by open assault, usually called *robbery*, or 2d, by privately stealing.—*Ibid*, 243.

Definition.

Division.

Robbery is the felonious taking of money or goods of any value from the person of another, or in his presence, by violence, or putting fear.—*Ibid*.

Definition.

As to the taking, carrying away, intent, &c., necessary to complete the offence, we refer to those matters, under the head of *simple larceny*, and proceed to inquire,

Taking, etc

- 1st. *Of the Taking from the Person or Presence of the Owner.*
- 2d. *Of the Violence, or Putting in Fear.*
- 3d. *Of the Punishment.*

The taking is sufficient if it be in the presence of the owner.

Of the taking from the Person, &c.—The taking need not be immediately from the person of the owner; it will be sufficient if it be in his presence. Therefore if A., upon being assaulted by a thief throws his purse or cloak into a bush, and the thief takes it up and carries it away; or if, while A. is flying from the thief, he lets fall his hat, and the thief takes it up and carries it away, such taking being done in the presence of A., will be sufficient. So, if the thief having first assaulted A., takes away his horse standing by him; or having put him in fear, drives his cattle, in his presence, out of his pasture, he may be properly said to take such property from the person of A., for he takes it openly and before his face, while under his immediate and personal care and protection. But it is clear, that the property must be taken in the presence of the owner. And where it appeared, upon a special verdict, that some thieves gently struck the prosecutor's hand, whereby some money, which he had taken out from his pocket to give change, fell to the ground, and that, upon his offering to take it up, the thieves threatened to knock his brains out, upon which he desisted from taking up the money, and the thieves, "then and there immediately" took it up; a great majority of the judges held, that even by this statement, it was not sufficiently expressed in the special verdict that the thieves took up the money in the sight or presence of the owner, and that they could not intend it, though there seemed to have been evidence enough to have warranted such a finding. 2d Russell, 66.

Of the violence, or putting in fear.

Of the Violence, &c.—If it appears that the property be taken by either of these means, against the will of the party, such taking will be sufficient to constitute robbery. The principle, indeed, of robbery, is violence; but it has been often holden, that actual violence is not the only means by which a robbery may be effected, but that it may also be effected by fear, which the law considers as constructive violence.—Ibid, 67.

Of the degree of violence.

With respect to the degree of actual violence, where the taking is effected by that means, it appears to be well settled, that a sudden taking or snatching from a person unawares, is not sufficient. Thus, where a boy was carrying a bundle, along the street in his hand, after it was dark, when the prisoner ran past him and snatched it suddenly away, it was holden that the act was not done with the degree of force and terror necessary to constitute robbery. And the same was holden in a case, where it appeared, that as two little boys were carrying a parcel of cloth to one of the inns at Bath, for the purpose of its being carried by a stage-coach to London, the prisoner came up suddenly,

snatched the cloth from the head of one of them, and ran off with it. The same doctrine was also holden in two other cases; in one of which, the hat and wig of a gentleman were snatched from his head in the street; and in the other, an umbrella was snatched suddenly out of the hand of a woman, as she was walking along the street. But if any injury be done to the person, or there be any struggle by the party to keep possession of the property before it be taken from him, there will be a sufficient actual violence. Thus, where an ear-ring was snatched from a lady's ear, and the ear torn through, and blood drawn by the force used, it was holden to be robbery. So, where a heavy diamond-pin, with a cork-screw stalk, twisted very much in a lady's hair, which was close frizzed and strongly craped, was snatched out, and part of the hair torn away at the same time, it was holden that this was a sufficient degree of violence to constitute robbery. And in a case, where it appeared that the prisoner snatched at a sword, while it was hanging at a gentleman's side, and that the gentleman, perceiving him get hold of the sword, instantly laid tight hold of the scabbard, which occasioned a struggle between them, in which the prisoner got possession of the sword, and took it away; the Court held that it was a robbery.—Ibid, 68.

Where violence is made use of, to obtain the property with a felonious intent, it seems that it will not the less amount to robbery, on account of the thief having recourse to some colorable or specious pretence, in order the better to effect his purpose. One Merriman, who was taking cheeses along the high-way in a cart, was stopped by a person named Hall, who insisted upon seizing them for want of a permit. This was a mere pretence, no permit being necessary. After some altercation, Merriman and Hall agreed to go before a magistrate, to determine the matter: and during Merriman's absence, other persons riotously assembled on account of the dearth of provisions, and, in confederacy with Hall, for the purpose, carried away the goods. It was objected (upon an action against the hundred, on the statutes of hue and cry,) that this was no robbery, because there was no force; but Hewitt, J., over-ruled the objection, and left the case to the jury, who were of opinion, that Hall's conduct, in insisting upon seizing the cheese for want of a permit, was a mere pretence for the purpose of defrauding Merriman, and found that the offence was robbery; which was afterwards confirmed by the Court of King's Bench, on a motion for a new trial.—Ibid.

Violence accompanied with some colorable and specious pretence.

GAICOIGNE's case.—Where a bailiff hand-cuffed a woman, under pretence of carrying her to prison with greater safety, and by violence

extorted money from her when so hand-cuffed, it was holden to be robbery.—Ibid.

Of the fear of injury to the person.

The fear of injury to the person is that which is commonly excited on the commissions of this offence; and where property is obtained by these means, it will amount to robbery, though there be no great degree of terror or affright in the party robbed. It is enough, if the fact be attended with such circumstances of terror, such threatening by word or gesture, as, in common experience, are likely to create an apprehension of danger, and induce a man to part with his property for the safety of his person. And it is not necessary that actual fear should be strictly and precisely proved; as the law, in *odium spoliatoris* will presume fear, where there appears to be a just ground for it.—Ibid, 72.

Such fear may be presumed, though the party go to meet the robber, and for the purpose of apprehending him.

One Norden having been informed that one of the early stage-coaches had been frequently robbed near the town, by a single highway-man, resolved to use his endeavors to apprehend the robber. For this purpose, he put a little money and a pistol into his pocket, and attended the coach in a post-chaise, till the highway-man came up to the company in the coach, and to him, and presenting a weapon, demanded their money. Norden gave him the little money he had about him, and then jumped out of the chaise with the pistol in his hand, and, with the assistance of some others, took the highway-man. This was holden to be a robbery of Norden.—Ibid.

And this fear may exist, though the property be taken under color and on pretence of a purchase.

The fear necessary to constitute the crime of robbery may exist, though the property be taken under color, and on the pretence of a purchase. For, if a person by force or threats, compel another to give him goods, and by way of color oblige him to take, or if he offer less than the value, it is robbery: as where the prisoner took a quantity of wheat worth eight shillings, and forced the owner to take thirteen pence half penny for it, threatening to kill her if she refused, the offence was clearly holden to be robbery by all the judges, upon a conference. But whether the forcing a chapman to sell his wares, and giving him the full value for them, will amount to robbery, has been considered as doubtful.—Ibid.

The fear may be of violence to the child of the party.

It seems that the fear of violence to the person of a child of the party from whom property is demanded, will fall within the same consideration as if the fear were of violence to the person of the party himself. Thus, where a case was put in argument of a man walking with his child, and delivering his money to another person upon a threat, that unless he did so, the other would destroy his child; Hotham, B. said, that he had no doubt that it would be robbery. And in a subsequent

case, Eyre, C. J., said, that a man might be said to take by violence, who deprived the other of the power of resistance, by whatever means he did it; and that he saw no sensible distinction between a personal violence to the party himself, and the case put by one of the judges, of a man holding another's child over a river, and threatening to throw it in unless he gave him money.—Ib.

The cases in which the offence of robbery has been committed, by means of a fear of injury to the property of the party, are principally those in which the terror excited, was of the probable outrages of a mob. As by a threat to tear the mow of corn, and level the house of the prosecutor; or where money is extorted by the prisoner at the head of a mob, without any particular threat being expressed; or by a threat of destroying the house; or by a threat of taking corn away, by which the prosecutor was compelled to sell it for less than its value; or where money is obtained by a threat, that the house of the prosecutor should be pulled down by a mob, at a future time. 2d Russell, 3 and 74.

The cases of robbery in which the property has been obtained by means of a fear being excited, of injury to the character of the party robbed, appear to be all of one description. Indeed, it has been said, that the terror which leads a party to apprehend an injury to his character, has never been deemed sufficient to support an indictment for robbery, except in the particular instance of its being excited by means of insinuations against, or threats to destroy the character of the party pillaged, by accusing him of sodomitical practices. The fear of being sent to prison, is not alone a sufficient ground of terror to constitute robbery.—Ib., 75.

But parting with property upon the charge of an unnatural crime, will not make the taking a robbery, if it is parted with, not from fear of loss of character, but for the purpose of prosecuting the offender. The prisoner applied to Fry to lend him ten shillings, and upon his refusal, threatened to charge him with an unnatural crime, and got from him one pound, ten shillings. Fry parted with it from an anxiety that his master's family might not be disturbed, and in expectation that he might secure the prisoner; and he immediately stated the circumstances to his master, and to a friend, and planned with them what he should do in case of the prisoner applying again. The prisoner did apply again; and Fry, fixed to meet him, marked some money, engaged a constable, and having met the prisoner, gave him the money, and had him apprehended: he parted with this money in order that he might prosecute, because he knew himself innocent, and

Or the fear
of injury to
the property.

Of the fear
of injury to
the character.

Parting with
the money,
for the
purpose of
afterwards
prosecuting
the offender,
does not
amount to
robbery.

not from the threats. Upon a case reserved, the judges held that this taking did not constitute a robbery, and the prisoner was recommended for a limited pardon.—*Ib.*, 87.

Death without benefit of clergy.

Punishment.—By 23 Henry 8th, c. 1st; 2d S. L., 459, robbery, when committed in a dwelling house, or in or near about the highways, was punished with death, without benefit of clergy; and by 3 and 4 W. & M., c. 9, it is enacted that robbery, wheresoever committed, shall be thus punished.

Privily stealing from the person.—With respect to such stealing from the person as does not amount to robbery, it is enacted by 8th Elix, c. 4, that no person or persons which hereafter shall happen to be indicted or appealed for felonious taking of any money, goods or chattels, from the person of any other, privily without his knowledge, in any place whatsoever, and thereupon found guilty by verdict of twelve men, or shall confess the same upon his or their arraignment, or will not answer directly to the same according to the laws of this realm, or shall stand wilfully, or of malice, or obstinately mute, or challenge peremptorily above the number of twenty, or shall be upon such indictment or appeal, outlawed, shall from henceforth be admitted to have the benefit of his or their clergy, but utterly be excluded thereof, and shall suffer death in such manner and form, as they should if they were no clerks. 2d S. L., 496, sec. 2.

L I B E L .

A libel is such an immodest, indecent, and immoral publication, as tends to corrupt the mind and to destroy the love of decency, morality and good order; or, it is a malicious defamation of any person made public by printing, writing, signs or pictures, tending to blacken the memory of the dead, with intent to provoke the living, or to injure the reputation of the living, provoke him to wrath, or expose him to hatred, contempt or ridicule. 1st Russ., 209; and 6th Am. C. L., 425.

1st. DIFFERENCE BETWEEN LIBEL AND SLANDER.

2d. LIBELLOUS WORDS, AND MODE OF EXPRESSIONS.

3d. OF THE PUBLICATION, AND PERSONS CONCERNED THEREIN.

4th. THE CIRCUMSTANCES WHICH WILL PREVENT A PUBLICATION
FROM BEING LIBELLOUS.

5th. OF THE MALICE.

6th. OF THE PUNISHMENT.

1st. *Difference between Libel and Slander.*

It does not follow that the libel is not actionable, because words of similar import, when spoken, are held not to be so; for the rule with respect to written slander, is different from that which prevails when it is only verbal. Words, to be actionable when spoken of a person not in any office, trade or profession, must imply the imputation of an offence which would subject him to corporal, or other infamous punishment; but words, when written, if they tend to degrade or disgrace, or to render odious or ridiculous the person of whom they are written, will be libellous, and consequently actionable. This distinction between written and verbal slander, is abundantly established by the most unquestionable authority. *Austin vs. Culpepper*, 2d Show, 314; *Warner vs. Ellizer*, 1st Keb., 293.

An action lies for scandalizing a man by words, which, if spoken, would not subject him to prosecution.—*Ib.*

And words, which when spoken, may be considered not defamatory, are, when reduced to writing. *Thorley vs. Lord Kerry*, 4th Taun. 355.

As to say a man is dishonest is not actionable, but when published they become so. *Rex vs. Smith*, Skin., 124.

So also, in slander, the defendant may justify that the words spoken are true; but on indictment for libel, it is immaterial whether the matter be true or false, since the provocation, and not the falsity, is to be punished criminally. 4th B. C., 151.

2d. *Libellous words, and modes of expressions.*

To constitute a libel, the words published must be such as, in the common estimation of mankind, are calculated to reflect shame and disgrace upon the person concerning whom they are written. *Fonville vs. McNease*, Dud., 303.

A libel may be as well by descriptions and circumlocutions as in express terms; therefore scandal conveyed by way of allegory or irony, amounts to a libel. As where a writing, in a taunting manner, reckoning up several acts of public charity done by a person, said, "you will not play the Jew, nor the hypocrite," and then proceeded, in a strain of ridicule, to insinuate that what the person did was owing to his vain glory. Or where a publication, pretending to

*Of the modes
of expression*

recommend to a person the characters of several great men for his imitation, instead of taking notice of what great men are generally esteemed famous for, selected such qualities as their enemies accuse them of not possessing; (as by proposing such a one to be imitated for his courage; who was known to be a great statesman, but no soldier; and another to be imitated for his learning who was known to be a great general, but no scholar;) such a publication being as well understood to mean only to upbraid the parties with the want of these qualities, as if it had done so directly and expressly. And, upon the same ground, not only an allegory but a publication in hieroglyphics, or a rebus or anagram, which are still more difficult to be understood, may be a libel; and a Court, notwithstanding its obscurity and perplexity, shall be allowed to judge of its meaning, as well as other persons. And it is now well established, that slanderous words must be understood by the Court in the same sense as the rest of mankind would ordinarily understand them. Formerly it was the practice to say that words were to be taken in the more lenient sense; but that doctrine is now exploded; they are not to be taken in the more lenient or more severe sense, but in the sense which fairly belongs to them, and which they were intended to convey. 1st Russ., 210.

Name of the
person
libelled in
blanks.

Upon the same principles, it has been resolved that a defamatory writing, expressing only one or two letters of a name, in such a manner that from what goes before, and follows after, it must needs be understood to signify a particular person, in the plain, obvious, and natural construction of the whole, and would be nonsense if strained to any other meaning, is as properly a libel, as if it had expressed the whole name at large; for it brings the utmost contempt upon the law to suffer its justice to be eluded by such trifling evasions; and it is a ridiculous absurdity to say that a writing, which is understood by every one of the meanest capacity, cannot possibly be understood by a judge or jury.—Ib.

The most simple idea of a libel, is where defamatory malice is reduced to writing. But it may also be by the exhibition of a picture, fixing a gallows at a man's door, burning him in effigy, or exhibiting him in any ignominious manner. 4th B. C., 149; note.

3d. *Of the Publication, &c.*

No one is indictable for writing a libel unless he actually publish it to the world; but the communication thereof to any one person is a publication in the eye of the law, and therefore the sending an abusive letter to a private person, is as much a libel as if it were openly

ted. 2d Tomlins, 432. But in the case of *Fonville vs. McNease*, as held, that sending such sealed letter, though good ground for treatment, would not sustain a civil action for damages. Dudley,

one man repeats a libel, another writes it, and a third approves of the making and publication of a libel. If it is written, they will all be makers of the libel; and it may be laid

generally that all who are concerned in composing, writing, publishing a libel, are guilty of the misdemeanor, unless the part had in the transaction was a lawful or an innocent act; and offence has been held not to excuse. Thus, upon an information against the defendant, for printing and publishing a libel, the evidence was, that he acted as a servant to the printer, and clapped down the press; and few or no circumstances were offered of his knowing the contents of the paper, or being conscious that he was doing any thing unlawful: and Raymond, C. J., held, that this made the defendant guilty, and so the jury found him. But there must be a publication; the mere writing or composing a defamatory paper by any one, which is confined to his closet, and neither circulated nor read to others, will not render him responsible; nor will he be held to have published the paper, if he deliver it by mistake, out of his study.

It will not be a publication of a libel if a party takes a copy of it, provided he never publishes it: but a person who appears once to have taken a libel, which is afterwards published, will be considered as maker of it, unless he rebut the presumption of law by showing that he is not the author, or prove the act to be innocent in himself. By Holt, C. J., if a libel appears under a man's hand-writing, and the author is known, he is taken in the manner, and it turns the law upon him; and if he cannot produce the composer, it is hard to say that he is not the very man. 1st Russell, 234.

The reading of a libel in the presence of another, without previous knowledge of its being a libel, or the laughing at a libel read by another, or the saying that such a libel is made by J. S., whether done with or without malice, does not amount to a publication. And it has also been held, that he who repeats part of a libel in merriment, without any malice or purpose of defamation, is not punishable; though this has been doubted. But it seems to have been agreed, that if he who hath either read a libel himself, or hath heard it read by another, do afterwards maliciously read or repeat any part of it in the presence of others, or lend or show it to another, he is guilty of unlawful publication of it. In a late case, however, of an action for a libel contained in a caricature print, where the witness stated,

that having heard that the defendant had a copy of this print, he went to his house and requested liberty to see it, and that the defendant thereupon produced it, and pointed out the figure of the plaintiff and the other persons it ridiculed; Lord Ellenborough, C. J., ruled, that this was not sufficient evidence of publication to support the action. Proof that the libel was contained in a letter directed to the party, and delivered into the party's hands, is sufficient proof of a publication upon an indictment or information. And delivering a libel sealed, in order that it may be opened and published by a third person in a distant county, is a publication. 1st Russell, 235.

Procuring
another to
publish.

It seems to be agreed, that not only he who publishes a libel himself, but also he who procures another to do it, is guilty of the publication; and it is held not to be material whether he who disperses a libel knew any thing of the contents or effects of it or not, for that nothing would be more easy than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher would make him safe in dispersing them. 1st Russell, 236.

Publications
by book-
sellers and
proprietors
of newspa-
pers.

Upon this foundation it has for a long time been held, that the buying of a book or paper containing libellous matter, in a bookseller's shop, is sufficient evidence to charge the master with the publication, although it does not appear that he knew of any such book being there, or what the contents thereof were, and though he was not upon the premises, and had been kept away for a long time by illness; and it will not be presumed that it was bought and sold there by a stranger; but the master must, if he suggests any thing of this kind in his excuse, prove it. So the proprietor of a newspaper is answerable criminally as well as civilly for the acts of his servants in the publication of a libel, although it can be shown that such publication was without the privity of the proprietor. These are acts done in the course of the trade or business carried on by the master. But in a case of an action for a libel, where it appeared upon the evidence that the defendant, a tradesman, was accustomed to employ his daughter to write his bills and letters: that a customer, to whom a bill, written by the daughter, had been sent by the daughter, sent it back on the ground of the charge being too high, and that the bill was afterwards returned to the customer, enclosed in a letter also written by the defendant's daughter, and being a libel upon the plaintiff who had inspected and reduced the bill for the customer: it was holden that this was not sufficient evidence to go to a jury, either of command, authority, adoption, or recognition by the defendant.—Ibid.

h. The circumstances which will prevent a Publication from being libellous.

It has been resolved, that no false or scandalous matter contained in a petition to a committee of Parliament, or in articles of the peace published to justices of the peace, or in any other proceeding in a regular course of justice, will make the complaint amount to a libel; and it would be a great discouragement to suitors to subject them to public prosecution in respect of their application to a Court of justice. Thus, where a charge was, that the defendant, in a certain affidavit before the Court, had said that the plaintiff in a former affidavit against the defendant had sworn falsely, the Court held that this was not libellous; for in every dispute in a Court of justice, where one affidavit charges a thing, and the other denies it, the charges must be contradictory, and there must be affirmation of falsehood. It is so held that no presentment of a grand jury can be a libel, not only because persons who are supposed to be returned without their own seeking, and are sworn to act impartially, shall be presumed to have proper evidence for what they do, but also because it would be of the most ill consequence in any way to discourage them from making their inquiries with that freedom and readiness which the public good requires. Where an action was brought against the president of a military Court of Inquiry, for a libel contained in the minutes of such Court, which had been delivered by the defendant to the commander in chief, and deposited in his office; it was held that these minutes were a privileged communication, and properly rejected when tendered at the trial in proof of the alleged libel; and also that a copy of them had been properly rejected. And where a court martial, after stating in their sentence the acquittal of an officer against whom a charge had been preferred, subjoined thereto a declaration of their opinion, that the charge was malicious and groundless, and that the conduct of the prosecutor in falsely calumniating the accused, was highly injurious to the service; it was held that the president of the court-martial was not liable to an action for a libel for having delivered such sentence and declaration to the Judge Advocate; and Mansfield, C. J., in delivering his opinion, said, "if it appear that the charges are absolutely without foundation, is the president of the court-martial to remain perfectly silent on the conduct of the prosecutor; or can it be any offence for him to state that the charge is groundless and malicious?" at Russell, 213.

Petitions to
Parliament,
and other
authorized
proceedings.

Where words charged as libellous, are uttered in a judicial proceeding, and constitute the necessary information for obtaining a search warrant, an action for a libel cannot be sustained. The information is a part of the proceeding, and cannot be considered as a libellous publication. If the proceeding originated in malice, and without any reasonable or probable cause, the remedy is an action on the case, for maliciously suing out a search warrant. *Vausse vs. Lee*, 1st Hill, 197.

How far
publication
of proceed-
ings in courts
of justice is
allowable.

It has always been held, that a publication of the proceedings in a court of justice will not be protected, unless it be a true and honest statement of those proceedings. But provided it were of that character, the doctrine seems at one time to have been, that it might be made to the full extent of stating what had actually taken place. More recently, however, it has been said, that it must not be taken for granted that the publication of every matter which passes in a court of justice, however truly represented, is, under all circumstances, and with whatever motive published, justifiable; and that such doctrine must be taken with grains of allowance. And Lord Ellenborough, C. J., said,—“It often happens that circumstances necessary for the sake of public justice to be disclosed by a witness in a judicial inquiry, are very distressing to the feelings of individuals on whom they reflect; and if such circumstances were afterwards wantonly published, I should hesitate to say that such unnecessary publication was not libellous, merely because the matter had been given in evidence in a court of justice.” In a subsequent case, not relating directly to this point, but to the publication of proceedings in Parliament, Bailey, J., said,—“It has been argued that the proceedings of courts of justice are open to publication. Against that, as an unqualified proposition, I enter my protest. Suppose an indictment for blasphemy, or a trial where indecent evidence was necessarily introduced; would every one be at liberty to poison the minds of the public, by circulating that, which, for the purposes of justice, the Court is bound to hear? I should think not; and it is not true, therefore, that in all instances, the proceedings of a court of justice may be published. Again, it may be said that counsel have a right, in pursuance of their instructions, and whilst the cause is going on, to endeavor to produce an effect by making such observations on the credit and character of parties and their witnesses as sometimes, when the cause is over, perhaps they are sorry for. But have they, therefore, or any person who hears them, a right afterwards to publish those observations? I have no hesitation in saying that when the occasion ceased, the right also would cease;

and that it would be no justification to plead that such a publication was a transcript of the counsel's speech." 1st Russ., 214.

This doctrine was recognized and acted upon in a recent case. The defendant's husband had been convicted of publishing a blasphemous libel, after having in his defence at the trial used arguments and statements of a blasphemous and indecent description. His wife published the trial; and upon showing cause against a rule for a criminal information, it was urged that she had a right to publish what actually took place in a Court of justice; but the Court were clear she had not, if that statement contained any thing defamatory, seditious, blasphemous, or indecent: and the rule was made absolute. And where it is allowable to publish what passes in a Court of justice, the party must publish the whole case, and not merely state the conclusion which he himself draws from the evidence. Thus, where the libel stated in the declaration purported to be a speech of counsel at a trial of the plaintiff on a criminal charge, and, after setting out the speech, said that a witness was called who proved all that had been stated by counsel, and that the defendant was immediately afterwards acquitted upon a defect in proving some matter of form; and the plea stated that in fact such a speech was made, and that the witness called proved all that had been so stated, but it did not set out the evidence or justify the truth of the charges made in the counsel's speech; it was holden that such plea was bad, inasmuch as a party could not be justified in publishing the result of evidence given in a Court of justice, but must state the evidence itself. And the party making the publication will not be justified, unless he confines himself to what actually passed in Court. In a case where an action was brought for a libel concerning the plaintiff in his profession as an attorney, and the libel, as stated in the declaration, began, "shameful conduct of an attorney," and then proceeded to give an account of proceedings in a Court of law which contained matter injurious to the plaintiff's professional character, and the defendant had pleaded that the supposed libel contained a true account of the proceedings in the Court of law; it was holden (after verdict for the defendant) that the plea was bad, inasmuch as the words "shameful conduct of an attorney," formed no part of the proceedings in the Court of law, and that the plaintiff was therefore entitled to judgement. 1st Russ., 215.

It should be observed also, that the publication of preliminary examinations before a magistrate, taken *ex parte*, will not come within the principle by which the fair reports of proceedings in Courts

Publications
of *ex parte*
examina-
tions before
a magistrate,

may be
libellous.

of justice have been held to be privileged. Such publications have a tendency to cause great mischief by perverting the public mind, and disturbing the course of justice; and, if they contain libellous matter, will be considered as highly criminal. And the Court of King's Bench has gone to the extent of granting a criminal information, for publishing in a newspaper a statement of the evidence given before a coroner's jury, accompanied with comments; although the statement was correct, and the party had no malicious motive in the publication. 1st Russ., 216.

Comments
upon literary
productions.

A publication commenting upon a literary work, exposing its follies and errors, and holding up the author to ridicule, will not be deemed a libel, provided such comment does not exceed the limits of fair and candid criticism, by attacking the character of the writer, unconnected with his publication; and every one has a right to publish a comment of this description. But if a person, under the pretence of criticising a literary work, defames the private character of the author, and, instead of writing in the spirit and for the purpose of fair and candid discussion, travels into collateral matter, and introduces facts not stated in the work, accompanied with injurious comments upon them, such person is a libeller. A fair and candid comment on a place of public entertainment, in a newspaper, is not a libel. 1st Russell, 230.

Confidential
communications.

Confidential communications are in some cases privileged. As where it was holden that a letter written confidentially to persons who employed A. as their solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had entrusted to him, and in which B., the writer of the letter, was likewise interested, was not a libel. And if a person, in a private letter to the party, should expostulate with him about some vices, of which he apprehends him to be guilty, and desires him to refrain from them; or if a person should send such a letter to a father, in relation to some faults of his children; these, it seems, would not be considered as libellous, but as acts of friendship, not designed for defamation, but reformation. But this doctrine must be applied with some caution; since the sending an abusive letter filled with provoking language to another, is an offence of a public nature, and punishable as such, inasmuch as it tends to create ill blood, and cause a disturbance of the public peace; and the reason assigned by Lord Bacon, why such private letter should be punishable, seems to be a very sufficient one, namely, that it enforces the party to whom the letter is directed to publish it to his friends, and thus induces a

compulsory publication. And though a letter written by a master, in giving a character of a servant, will not be libellous, unless its contents be not only false, but malicious; yet in such a case malice may be inferred from the circumstances. 1st Russ., 231.

Although that which is written may be injurious to the character of another, yet if done *bona fide*, or with a view of investigating a fact, in which the party making it is interested, it is not libellous. Thus, where an advertisement was published by the defendant at the instigation of A., the plaintiff's wife, for the purpose of ascertaining whether the plaintiff had another wife living when he married A.; it was holden, that although the advertisement might impute bigamy to the plaintiff, yet having been published under such authority, and with such a view, it was not libellous. And if the communication be made in the regular and proper course of a proceeding, it will not be libellous. As where a writing, containing the defendant's case, and stating that some money, due to him from the government for furnishing the guard at Whitehall with fire and candle, had been improperly obtained by a captain C., was directed to a general officer, and the four principal officers of the guards, to be presented to his Majesty for redress; an information was refused, on the ground that the writing was no libel, but a representation of an injury drawn up in a proper way for redress, without any intention to asperse the prosecutor; and that though there was a suggestion of fraud, yet that is no more than is contained in every bill in chancery, which is never held libellous if relative to the subject matter. So a petition addressed by a creditor of an officer in the army to the Secretary at War, *bona fide*, and with the view of obtaining, through his interference, the payment of a debt due, and containing a statement of facts which, though derogatory to the officer's character, the creditor believed to be true, is not a malicious libel, for which an action is maintainable. And where the defendant, being deputy-governor of Greenwich hospital, wrote a large volume, containing an account of the abuses of the hospital, and treating the characters of many of the officers of the hospital, (who were public officers,) and Lord Sandwich in particular, who was first Lord of the admiralty, with much asperity; and printed several copies of it, which he distributed to the governors of the hospital only, and not to any other person; the rule for an information was discharged. Lord Mansfield said, that this distribution of the copies to the persons only who were from their situations called on to redress these grievances, and had, from their situations, competent power to do it, was not a publication sufficient to make the

Communications made *bona fide*, or with a view of investigating a fact.

Or made in the proper course of a proceeding.

writing a libel. And where the publication is an admonition, or in the course of the discipline of a religious sect, as the sentence of expulsion from a society of Quakers, it is not libellous. And it has been decided that an action will not lie for words innocently read as a story out of a book, however false and defamatory they may be. Thus, where a clergyman, in a sermon, recited a story out of Fox's Martyrology, that one G. being a perjured person, and a great persecutor, had great plagues inflicted upon him, and was killed by the hand of God; whereas in truth he never was so plagued, and was himself actually present at the discourse; the words being delivered only as a matter of history, and not with any intention to slander, it was adjudged for the defendant.—Ib.

5th. Of the Malice.

Criminal
intention of
the defend-
ant.

The criminal intention of the defendant will be matter of inference from the nature of the publication. In order to constitute a libel, the mind must be in fault, and show a malicious intention to defame; for, if published inadvertently, it will not be a libel; but where a libellous publication appears, unexplained by any evidence, the jury should judge from the overt act; and where the publication contains a charge slanderous in its nature, should from thence infer that the intention was malicious. The intention may be collected from the libel, unless the mode of publication, or other circumstances explain it; and the publisher must be presumed to intend what the publication is likely to produce; so that if it is likely to excite sedition, he must be presumed to have intended that it should have that effect. Publishing what is a libel, without excuse, is indictable, though the publisher be free from what in common parlance, is called malice; for defaming wilfully, without excuse, is in law, malicious. 1st Russell, 243.

6th. Of the Punishment.

The punishment of libellers, for either making, repeating, printing or publishing the libel, is fine, and such corporal punishment as the Court in its discretion shall inflict; regarding the quality of the offence and the quality of the offender. 1st Haw. P. C., 357.

LIMITATIONS.

1st. OF PROSECUTIONS.

2d. OF ACTIONS.

1st. *Prosecutions.*

In all and every case where any penalty, fine, or forfeiture whatever, hath been or shall be hereafter inflicted or imposed by any Act or Acts of the General Assembly of this Province, already passed, or hereafter to be passed, and the time of prosecuting the offender or offenders against such Acts not thereby provided, no information, action, suit, or prosecution shall be had, issued, brought, or commenced against the offender, or offenders against any such Act or Acts, for or in respect of any such penalty, fine, or forfeiture, unless the same be done within six months after the time of passing this Act, if the offence hath been already committed, and within the like space of time after the offence committed for the future; and all and every offender and offenders against any such Act or Acts, shall not from thenceforth be subject or liable to any penalty, fine or forfeiture, which may thereby be inflicted or imposed; any law, usage or custom, to the contrary thereof in any wise notwithstanding. 3d S. L., 701.

Where no time is limited, all prosecutions for penalties and forfeitures must be commenced within six months after offence committed.

The statute of limitations bars an indictment for hog stealing, if not commenced within six months after the offence. *State vs. Youngblood*, 2d McCord, 241.

The statute of limitations confining prosecutions for fines and forfeitures to six months, relates not to the fine inflicted upon a white person for murdering a slave, nor does it seem to relate to the punishment by fine or otherwise, of any felony. *State vs. Taylor*, 2d McCord, 483.

The Act of 1748, limiting the time for commencing prosecutions in respect of penalties, fines, and forfeitures, imposed by statute to six months after the offence committed, is no bar to an indictment for forgery, under the Act of 1801. The Act of 1748 relates only to pecuniary penalties, imposed by statute, and does not apply either to the common law punishment of an offence, for which further penalties are provided by statute, or to any corporal punishment imposed by a statute. *State vs. Fields*, 2d Bailey, 554.

A prosecution under the Act of 1817, for trading with a slave, not commenced until six months after the offence, is not barred by the Act of 1748, as regards the imprisonment. Corporal punishment is not embraced in the words "penalty or forfeiture," both of which

were intended to apply to cases where the punishment is pecuniary only.—*State vs. Free*, 2d Hill, 628.

If a fine or forfeiture, imposed by statute, be not prosecuted or sued for within the six months, it may be taken advantage of by plea in bar, or motion in arrest of judgement. *State vs. James*, 2d Bay, 215.

2d. Of Actions.

1st. The Bar of the Statute.

2d. *Exceptions and Matters which will revive the Right of Action, or prevent the Bar of the Statute.*

The limitation of certain personal actions.

The Bar of the Statute.—All actions of trespass *quare clausum fregit*, all actions of trespass *detinue*, action *sur trover* and *replevin*, for taking away of goods and chattels, all actions of account and upon the case (other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants,) all actions of debt, grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent reserved by indenture, all actions of covenant, and all actions of assault, menace, battery, wounding and imprisonment, or any of them, which shall be sued or brought at any time after the ratification of this Act, shall be commenced and sued within the time and limitation hereafter expressed, and not after: that is to say, the said actions upon the case other than for slanders, and the said actions for accounts, and the said actions for trespass, debt, *detinue* and *replevin*, for goods and chattels, the said actions of covenant, and the said actions of *quare clausum fregit*, within three years next after the ratification of this Act, or within four years next after the cause of such actions or suits, and not after; and the said actions of trespass, of assault and battery, wounding, imprisonment, or any of them, within one year next after the ratification of this Act, or within one year next after the cause of such actions or suits, and not after; and the said actions upon the case of words, within six months after the ratification of this Act, or within six months next after the words spoken, and not after. 2d S. L., 585, sec. 6th.

Time for redemption of negroes, goods or chattels, sold by way of mortgage hereafter.

In all bills of sale hereafter to be made of any negroes, plate, gold and silver, or goods and chattels whatsoever, by way of mortgage, with right of redemption upon performance of proviso in the said bill of sale, and that the negroes, plate, gold and silver, or goods and chattels, are actually delivered unto the person to whom such bill of sale is made, and are in his actual possession, (and not a delivery or seizin in form of law only,) and shall continue in the same for the

pace of two years after the breach of the proviso in the said bill of sale, without redemption thereof, the said goods or chattels so sold and delivered, and possessed as aforesaid, though with right or equity of redemption, are hereby declared to be vested in the said person or persons to whom such bill of sale was made, and their executors, administrators and assigns, to have and to hold to them, their executors, administrators and assigns, as their own proper goods and chattels for ever; excepting such person or persons having such right or equity of redemption, be beyond the seas, or otherwise out of the limits of this Province, or a *feme covert*, all which persons shall have owed to them their equity of redemption, so as they prosecute the same within three years after the breach of the proviso of the bill of sale, and at no time after. 2nd S. L., 587, sec. 15.

The limitation of actions is of the *lex fori*, not of the *lex loci contractus*: therefore, to an action in the Courts of this State, on a contract made in another State, the statute of limitations of this State is a bar, although the action would not be barred by the statute of limitations of the State, in which the contract was made. *Levy vs. Coas*, 2d Bailey, 217.

Four years peaceable possession of negroes or other chattels, under *bona fide* sale for valuable consideration, gives the possessor a good title against a sheriff who may attempt to levy on them, as the property of a former proprietor, &c., under the pretence that they were bound by a former execution in his office. Trespass will lay against a sheriff who seizes negroes as the property of a third person, after they have been four years in the possession of a *bona fide* purchaser. *Cholett vs. Hart*; 2d Bay, 156.

The executor of A. was sued on a note of hand; plea, statute of limitations; replication, that by the Act of 1789, nine months are allowed to executors and administrators after the death of their testator or intestate, before they can be sued, and that the plaintiff ought not to be barred, having been restrained by the aforesaid Act nine months, from commencing his action. Held, that the plaintiff was allowed four years exclusive of the nine months. *Moses vs. Jones, N. & M'C.*, 259.

The Act of 1789 suspends the operation of the statute of limitations nine months after the death of the testator or intestate, but does not take from the plaintiff any part of the four years allowed by the act of limitations.—*Ib.*

On a note payable on demand, the maker is bound to pay immediately, and is not entitled to days of grace. The holder may sue on

the same day the note is made. Any other demand than by suit is unnecessary. *Smith vs. Bythewood, Rice, 245.*

Whenever the plaintiff may sue the defendant, a cause of action may be said to have accrued to him, and from that time the statute of limitations begins to run; consequently, upon a note payable on demand, the statute commences from the date, if it have one, and if without date, from its delivery.—*Ibid.*

The statute of limitations will run in favor of a private agent, to collect and pay over money from the time he collects it. *Estes vs. Stokes, 2d Rich., 133.*

A creditor, by proceeding jointly against the principal and surety to a note, and recovering judgement against only the surety, cannot effect the rights of the latter against his principal. And where, in such a case, a verdict was found for the principal, and against the surety, the record will not conclude the surety afterwards in an action against the principal to recover back the money paid by him, from shewing that the debt was that of the principal. Lapse of time from the date of the note in such case, affords no presumption in favor of the defendant. The plaintiff's right of action only accrues on the payment of the debt, and the statute of limitations then commences to run. *Peters vs. Barnhill, 1st Hill, 234.*

A judgement in the Court of a justice for the trial of causes small and mean, is within the operation of the statute of limitations. It is not matter of record. *Griffin vs. Heaton, 2d Bailey, 58.*

The second section of the Act of 1712, limiting the time for the prosecution of a right or title to lands to five years, is altered so to extend the time for the prosecution of such right or title to ten years. 6th S. L., 238, sec. 7th.

The statute of limitations runs against dower. *Ramsay vs. Dozier, 1st Treadway C. R., 112.*

Provided, if plaintiff be beyond the seas, or feme covert, &c.

Exceptions, &c.—If any person or persons is or shall be entitled to any such action of trespass, detinue, action *sur trover*, replevin, actions of accounts, actions of debts, covenant, actions of trespass for assault, menace, battery, wounding or imprisonment, actions upon the case for words, at the time of any such cause of action given or accrued, shall be beyond the seas, or *feme covert*, or imprisoned, shall be at liberty to bring their action at any time within four years after the ratification of this Act; or at any time within five years after such cause of action given or accrued, and at no time after; and also excepting any person or persons that are under the age of twenty-one years, who shall be allowed to bring their action at any time within

to years after they came to age, and if beyond the seas, three years.
S. L., 586, sec. 10.

By the saving words in our statute of limitations, "beyond seas," meant, "out of the State." *Forbes vs. Foot*, 2d M'Cord, 331.

Persons under twenty-one years, shall be allowed five years after ^{Infants.} attaining the said age, to prosecute their right or title to lands; four years after attaining such age to prosecute any personal action, to which they are or may be entitled; any thing in the Act passed twelfth day of December, one thousand seven hundred and twelve, to the contrary hereof in any wise notwithstanding. 5th S. L., 77, sec. 2d.

The statute of limitations shall not hereafter be construed to defeat rights of minors, when the statute has not barred the right in lifetime of the ancestor, before the accrual of the right of the ancestor. 6th S. L., 238, sec. 5th.

But this relates to actions concerning lands, *McCullough, vs. Speed*, McCord, 455; and the rule, that when the statute begins to run, will run on notwithstanding any intervening disability, still prevails to personal property. *Barino vs. McGee*, 3d McCord, 452.

Mutual accounts, to prevent the bar of the statute of limitations, where each party has an open, unsettled account against the other, existing at the same time, and existing together. *Cunningham vs. Dean*, ^{Accounts between merchants.} Dudley, 351.

A demand on the part of the defendant, arising subsequent to that of the plaintiff, cannot be regarded as a mutual account.—*Ib.*

If there be mutual running accounts between others than merchants, and any of the items have accrued within the time of the statute, this amounts to an acknowledgement of the previous account and a promise to pay, and prevents the operation of the statute of limitations. *Fitch vs. Hilleary*, 1st Hill, 292.

Receipts upon a note to take it out of the statute of limitations, if apparently fair, and not attended with circumstances calculated to create suspicion that they were endorsed for the purpose of taking the case out of the statute, are *prima facie* evidence of payment, and are to be left to the jury. *Gibson vs. Peebles*, 2d McCord, 418.

Suit on a bond, on which no interest had been paid for twenty-three years. Plea, payment, &c., evidence of an intermediate suit being commenced, but discontinued, not sufficient to rebut the presumption of payment; and the jury having found a verdict for defendant, a new trial refused. *Palmer vs. Dubois*, 1st M. C. R., 178.

A slight acknowledgement will arrest the operation of the statute

Promise to pay, by the party owing.

of limitations, where the statutory bar is not complete; but to revive a debt already barred, there must be either an express promise to pay, or an unequivocal admission, that the debt is still due and payable, unaccompanied by any expression, declaration, or qualification, indicative of an intention not to pay. *Young vs. Monpoe*, 2d Bailey, 278.

The defendant was indorser of a promissory note, and payment being demanded of him, after it was barred by the statute of limitations, he replied, that "he had not been served with notice of protest, and, therefore, had nothing to do with it; but if he had been legally notified, he would have paid it long ago." Held, insufficient to revive the debt; and that proof that there had been regular demand and notice to fix the liability of the defendant as indorser, made no difference.—*Ib.*

An offer to pay a very inconsiderable portion of a debt barred by the statute of limitations, in order to get the evidence of the debt out of the hands of the creditor, with no distinct admission by the debtor of his liability for the whole or any part, and no express promise to pay, is insufficient to remove the bar of the statute, or revive the debt. *Cohen & Nesbit, vs. Aubin*, 2d Bailey, 283.

A promise to pay a note barred by the statute of limitations, so as to enable the plaintiff to recover, under a count, on the note itself, must be without qualification or condition. *Brown vs. Joyner*, 1 Rich., 210.

If the promise is conditional, it must be declared on specially as a new cause of action, and the performance of the condition shown.—*Ibid.*

By one of two joint makers.

Where the statute of limitations has not run out, the promise or acknowledgement of one of two joint makers of a note, will prevent its operation against both; but where the bar of the statute was complete, a promise or acknowledgement by one, will only be obligatory on himself, and will not revive the demand against the other. *Silman vs. Silman*, 2d Hill, 416.

By an executor.

A promise to pay a debt, barred by the statute of limitations, constitutes a new cause of action, which, a party seeking to avail himself of, must declare upon in the words in which it was made, or according to its legal effect. The old debt is regarded as the consideration which supports the promise. *Reigne vs. Ex'or Desportes*; *Dudley*, 118.

If the promise be made by one, to the other of the parties to the original contract, it is not necessary that it should be declared on

cifically; for it corresponds with the *allegata* of the usual counts, and may be given in evidence under them. It is otherwise where a promise is made by, or to a person, not a party to the original contract.—Ib.

The promise of an executor or administrator, to pay a debt which is barred by the statute in the lifetime of the testator or intestate, is not binding; but where the statute had not run out, a subsequent promise made by the executor or administrator, will constitute good cause of action upon which the plaintiff may recover against him.—Ib.

The assignee of an unnegotiable due bill which was barred by statute, cannot recover upon a new promise made before the assignment.—Ib.

Where a debt due by the testator was not barred by the statute of limitations at the time of his death, and an acknowledgement or promise to pay is made by one of several executors, before the statutory term is complete, they will all be liable on a count alleging promises of the testator, if the action is brought at any time within four years from the time of such acknowledgement or promise made. *Lomax vs. Roberts*; *Robertson*; *Dudley*, 365.

The principle of all the cases seems to be, that the debt is not barred if there has been a sufficient promise to pay at any time within four years from the commencement of the action.—Ib.

No time bars a direct trust, as between a trustee and *cestui que* Trusts.
trust, but to a constructive trust the bar of the statute appears. *Fisher vs. Tucker*; 1st *McCord's Ch.*, 176.

And where a trustee does an act, which purports to be an execution of his trust, he is thenceforth divested of his fiduciary capacity, and will be protected against an account by the statute of limitations. *More vs. Porcher*; *Bailey's Equity*, 195.

An executor or administrator cannot hold adversely to his testator distributees so as to mature a title by the statute of limitations, though they may claim by another title, but his possession will be referred to his title as executor or administrator. *Manegault vs. As*; *Bailey's Eq.*, 284; and *Talbird vs. Archer*, ib. 535.

Although our act of limitations of 1712 (P. L., 102) requires all actions of account, upon the case, &c., to be brought "within four years next after the cause of such actions, or suits, and not after; and contains in itself no express saving, or exception, as to causes against persons out of the State, at the time such causes of action may accrue

Executors
and administrators.

Absence of
defendant.

against them; yet upon the construction of the whole act, held, that when such cause of action accrues to a plaintiff, resident in this State, against a party residing out of the State at the time, the statute does not begin to run until his return within the jurisdiction of the Courts of this State. *Smith vs. Mitchell; Rice, 316.*

When both parties are "beyond seas" at the making of the contract, and the defendant comes within the State, leaving the plaintiff "beyond seas," the plaintiff has five years, within which time to bring his action, computing from the time at which the defendant came into the State. *Lavasseur vs. Ligniez; 1st Strobhart, 326.*

The statute of limitations, having once commenced to run, is not suspended by the defendant's going out of the State. *Richardson vs. Whitfield; 2d M'Cord, 148.*

War.

A war suspends the operation of the statute of limitations between the citizens of the two countries, for the time during which it continues. *Wall vs. Robson; 2d N. & M'C., 497.*

LOTTERIES.

Penalty for
selling lottery
tickets.

It shall be unlawful to offer for sale any lottery tickets, or to open or keep any office for the sale of lottery tickets; and if any person shall offend against any of the provisions of this law, he shall, on conviction thereof, forfeit and pay to the State a sum not exceeding ten thousand dollars; and it shall be the duty of the tax collector of the district to prosecute the offender. *Acts 1846, 368.*

Not to affect
certain
lotteries.

The provisions of this law, shall not extend to the selling of tickets in any lottery which has actual legal existence and validity under any grant heretofore made by this State.—*Ib.*

£1,000 fine
for selling
lottery tick-
ets.

All and every person and persons whatsoever, who, at any time after the passing of this Act, shall publicly or privately erect, set up, or expose to be played, drawn or thrown at, or shall cause or procure to be erected, set up, exposed to be played, drawn or thrown at any lottery, under the denomination of sales of houses, lands, plate, jewels, goods, wares, merchandizes, or other things, whatsoever, or for money, or by any undertaking whatsoever in the nature of a lottery, by way of chances, either by dice, lots, cards, balls, numbers, figures,

or tickets, or who shall deliver out or cause to be delivered out tickets, numbers and figures, to any person or persons advancing money to entitle them to a share of the money so advanced, or to any houses, lands, plate, jewels, goods, wares, or merchandize, or otherwise, to be determined by any lottery to be drawn out of this Province, or by the chances of the prizes in any other lottery, or shall sell or dispose of, or cause to be sold or disposed of, any tickets, numbers or receipts in any foreign or other lottery, or who shall make, write, print or publish, or cause to be made, written or published, any scheme or proposal for any of the purposes aforesaid, and shall be convicted of any of the offences aforesaid, on any indictment for the same, at the Court of general sessions of the peace, oyer and terminer, assize and general jail delivery, shall forfeit the sum of one thousand pounds, proclamation money, one-third part thereof to his Majesty, his heir and successors, to be applied by the General Assembly for the use of this Province, one third part thereof to the informer, and the other third part thereof to the poor of the parish, where the offence shall be committed; and shall also, for every such offence, be committed by the said Court to the common jail, there to remain without bail or mainprize, for the space of twelve months, and from thence until the said sum of one thousand pounds, proclamation money, shall be fully paid and satisfied. 4th S. L., 180, sec. 1.

All and every person and persons who shall be adventurer or adventurers in, or shall pay any moneys or other consideration, or shall any way contribute unto, or upon account of any such sales or lotteries, shall forfeit for every such offence, the sum of one hundred pounds, proclamation money, to be recovered with costs of suit, by action of debt, or bill of indictment, in any of his Majesty's Courts of record in this Province, wherein no essoign, protection, wager of law, or any more than one imparlance shall be allowed; one moiety thereof to his Majesty, his heirs and successors, to be applied as aforesaid, and the other moiety thereof to the person or persons who shall inform and sue for the same.—Ibid.

£100 fine
for adventur-
ing in
lotteries.

A raffle of watches, or other articles, is not a lottery in the sense of the Act of 1762, and an indictment therefor will not lie under that Act. State vs. Pinchback, 2d M. C. R., 128.

LUNATICS.

1st. NOT TO BE CONFINED IN JAIL.

2d. WHO MAY BE ADMITTED TO THE ASYLUM, AND TERMS OF ADMISSION.

3d. PUNISHMENT FOR ASSAULTING.

4th. DUTIES OF MAGISTRATES THEREIN.

5th. OF COMMISSIONERS OF THE POOR.

1st. Not to be Confined in Jail.

It shall be the duty of the jailors of the several districts of this State, at the sitting of each Court of sessions, to report to the presiding judge the names of the persons confined in jail, who are lunatics, idiots or epileptics, with the cause of their detention. Act of 1839, 33, sec. 41.

Paupers,
lunatics, etc.,
not to be
imprisoned,
but sent to
the asylum.

No pauper, lunatic, idiot, or epileptic, shall hereafter be confined for safe keeping in any jail; and if any such person shall be imprisoned, under and by virtue of any legal process, it shall be the duty of the sheriff, in whose custody he may be, to obtain his discharge as speedily as possible, and send him forthwith to the asylum, according to law, at the expense of the Commissioners of the Poor, within whose limits he shall have gained a settlement. Act of 1839, 35, sec. 48.

2d. Who may be Admitted, &c.

It shall be the duty of the Regency to admit as subjects of the institution, all idiots, lunatics and epileptics, being citizens of this State, according to the following regulations, and subject to the following conditions, that is to say: all persons who shall be found idiots or lunatics, by inquisition from the Courts of Chancery, or on trial in Courts of common law, where the Court shall order such admission, or where it shall be requested under the hand of the husband or wife, or (where there is no husband or wife) of the next of kin of the idiot or lunatic. 6th S. L., 322, sec. 1.

Inquisition
to be made
by Courts.

Examination
by justices
and phys-
icians.

All persons who shall be declared lunatics, idiots or epileptics, after due examination by one justice of the quorum and two licensed practising physicians of the State. Where the subject is a pauper, the admission shall be at the request of the Commissioners of the Poor of the district, town or parish liable to support such pauper; otherwise the admission shall be at the request of the husband or wife, or where

ere is no husband or wife, of the next of kin of the idiot, lunatic or epileptic.—Ibid.

All idiots and lunatics, from any of our sister States, shall be admitted, on such evidence of their lunacy or idiocy, as the Regents regard efficient; but no foreign lunatic or idiot shall be admitted or kept in the institution, to the exclusion of subjects, being citizens of this State; they shall pay the same rates as citizen subjects.—Ibid.

Idiots from other States to be admitted.

No lunatic, idiot or epileptic, who are declared fit subjects of the institution, by a justice of the quorum and two physicians, or who shall be sent from a sister State, shall be retained in the institution more than ten days after his admission, except where there shall be entered in the records of the institution, an order for his retention, made, after full examination of his state of mind, by the medical attendant or attendants, and not less than three of the Regents; and upon such order being made, it shall be the duty of the secretary of the Regency to make out a certified copy of the declaration of the justice and physicians, and of the order of retention, and immediately send the same to one of the chancellors of the State, or to one of the judges of the courts of common law, who shall thereupon, either in open Court, or chambers, make such order in relation to the custody of the estate of the said subject, as would have been made had the proceedings been under a writ *de lunatico inquirendo*.—Ibid.

How long to be retained.

No subject shall be admitted into the institution, until one half year's expense of maintenance and medical attendance there, shall be paid to the treasurer of the Regency; and a bond and good security shall be given to pay the said expenses half yearly in advance, so long as the subject remains in the institution, and to pay all funeral charges in case of his death; but such bond shall not be required of the Commissioners of the Poor, sending a subject to the institution.—Ibid.

Terms of admission.

In case the half yearly advances are not paid, the bond shall be immediately put in suit, and no imparlance thereto shall be allowed; and in case the Commissioners of the Poor neglect to pay such advance, the Comptroller-general shall issue his warrant to the tax collector of the district or parish, liable to pay the same, requiring him immediately to collect the same, with five per cent. advance thereon, for his commission, from the taxable inhabitants of the district, town or parish liable to support such pauper, on the principles of the general tax of the State.—Ibid.

Bond to be put in suit.

Transient pauper lunatics, idiots or epileptics, sent to the asylum by virtue of the existing laws, shall be supported at the public expense; transient paupers, etc., to be sup-

Transient paupers, etc., to be sup-

ported at
the public
expense.

and the Regents are hereby authorized to draw from the Treasury, for the support of every such transient pauper, lunatic, idiot or epileptic, at the rate of one hundred dollars per annum, until the Regents shall have ascertained his or her former permanent domicil, when the district to which he or she may belong shall be charged with such support: *Provided*, nevertheless, that the Commissioners of the Poor of the district, so adjudged by the Regents to be chargeable, be, and they are hereby authorized to appeal from such decision to the next Court of sessions to be held for the said district, by which Court the liability of the district, for the support of such pauper, shall be tried; and the solicitor of the circuit is hereby required, upon such appeal, to defend the interests of the State; provided, that the treasury, in no instance, shall be liable to pay for the maintenance of paupers, other than such as are citizens of the State. 6th S. L., 437, sec. 2d.

Lunatics
may be sent
to the Asy-
lum by
chancellors.

The Chancellors of the State are hereby fully empowered to order any lunatic, idiot or epileptic, under the charge of the Court of Equity, to be sent to the Lunatic Asylum, and to make and enforce, at chambers, such orders on the committee as may be necessary to provide for the charges attending the same. 6th S. L., 382, sec. 5.

And by
judges of the
court of
sessions.

The judges of the Court of sessions are hereby authorized to send to the Lunatic Asylum, every person charged with the commission of any criminal offence, who shall, upon the trial before them, prove to be *non compos mentis*; and the said judges are authorized to make all necessary orders to carry into effect this power. Where the person so sent is a pauper, he shall be supported by the Commissioners of the Poor, or the municipal authorities of towns or cities, as the case may be; and where the person is not a pauper, he shall be supported out of his own estate, according to regulations to be prescribed by the Court, as on a return to a writ *de lunatico inquirendo*.—Ibid.

Every person now confined in jail, in consequence of having been found *non compos mentis*, shall be subject to the provisions of this clause. And it shall be the duty of the jailors of the several districts, at the sitting of each Court of sessions, to report to the presiding judge the names of the persons confined in jail, who are lunatics, idiots, or epileptics, with the cause of their detention.—Ibid.

3d. Punishment for Assaulting, &c.

It shall be the duty of the Regents to remove from office, and cause to be indicted, any person employed in the said institution, who shall assault any idiot, lunatic or epileptic, or use towards any such idiot, lunatic or epileptic, any other or greater violence than may be necessary for his or her restraint, government or cure. 6th S. L., 322, sec. 2d.

4th. Duties of Magistrates therein.

Whenever a chancellor or judge of the Court of Common Pleas shall direct an order to any justice of the quorum, to enquire as to the idiocy, lunacy or epilepsy of any person, it shall be the duty of such justice to call to his assistance two licensed practising physicians, and examine such person, and the evidence of his or her idiocy, lunacy or epilepsy; and if, after full examination, they shall find such person an idiot, lunatic or epileptic, they shall certify to the said judge or chancellor, whether, in their opinion such person is curable or incurable, and whether his enlargement would be harmless or dangerous, or annoying to the community; and thereupon, the judge or chancellor, in his discretion, may make an order that the said person shall be sent to the lunatic asylum. 6th S. L., 324.

Chancellor
or judge may
direct inquiry
to be
made.

When information, on oath, shall be given to any justice of the quorum, that a person is a lunatic, idiot or epileptic, and is chargeable for his support on the district, town or parish, it shall be the duty of said justice forthwith to call to his assistance two licensed practising physicians, and examine the said person, and the evidence of his or her idiocy, lunacy or epilepsy; and if they shall find such person an idiot, lunatic or epileptic, it shall be the duty of the Commissioners of the Poor of the district, town or parish, charged with his or her support, to send him or her to the lunatic asylum; unless the said justice and physicians shall certify that, in their opinion, he or she is incurable, and that no danger, annoyance or disturbance will result to the community by his or her not being confined in the asylum —Ib.

Justice may
call physi-
cians to his
aid.

5th. Commissioners of the Poor.

The Commissioners of the Poor, in each and every district, and all persons and bodies corporate, having charge of pauper idiots, lunatics and epileptics, resident in the several districts and parishes, shall be, and they are hereby, required to send them to the lunatic asylum, and to support there such idiot, lunatic or epileptic, at the expense of the city, town, parish or district, chargeable with the support of such persons; and for the support of each pauper lunatic, idiot or epileptic now in the asylum, or hereafter to be so sent, there shall be paid to the Regents of the asylum the sum of one hundred dollars per annum, lieu of the sum heretofore payable. 6th S. L., 437, sec. 1st.

MAGISTRATES.

- 1st. THEIR APPOINTMENT, NUMBER, QUALIFICATION, ENROLMENT.
- 2d. THEIR DUTIES, POWERS, &c. [SEE ATTACHMENT BAIL, CAUSES SMALL AND MEAN, JURISDICTION, &c.]
- 3d. THEIR DISABILITIES, AND LIABILITIES.
- 4th. OF THEIR INDEMNITY AND PROTECTION.

1st. Appointment, &c.

On the first day of March, eighteen hundred and forty-one, the officers of justice of the peace and of the quorum, as heretofore existing and established by law, shall be abolished: and instead thereof, magistrates appointed according to the provisions of this Act, at the session of the legislature, for the year eighteen hundred and forty, shall enter upon the duties of office, on the day on which those of the said justices shall become vacant; and until such day as herein first designated, every justice of peace and justice of quorum, for the several districts and parishes of this State, in office, or hereafter to be appointed, as by law heretofore of force, shall severally execute the provisions of this Act. Act 1839, 24, sec. 34.

Appoint-
ment, and
term of
office.

Magistrates shall be appointed by joint resolution of both branches of the legislature, and shall hold office for four years, and thence for forty days after the end of the session of the legislature at, during, or after which, such appointment shall expire. Any vacancy shall be supplied by the appointment of the Governor, and any magistrate appointed by the Governor, shall continue in office until the end of the next succeeding session of the legislature. Act 1839, p. 13, sec. 1st.

Office of
magistrate
abolished,
except in
certain
cases.

On the first day of March, in the year of our Lord one thousand eight hundred and forty-eight, the offices of magistrates as heretofore existing and established by law, shall be abolished, except in the city of Charleston, and the parishes of St. Stephen's, St. John's Berkley, St. James Goose Creek, Prince Williams, St. James Santee, and St. John's Colleton, and on the Neck, and instead thereof, magistrates to continue in office for four years, shall be appointed by resolution of the General Assembly, as follows, that is to say, one in each beat company, and two in each corporate town and Court-house village throughout the State, except in the parishes, where two magistrates may be appointed in each beat company; and whenever a beat company shall include portions of two districts or parishes, a magistrate

How to be
elected.

ay be appointed on each side of the line, who shall enter upon the ties of the office on the day on which the offices of the said magistrates shall become vacant; and in case any vacancy shall occur in an office of magistrate, during the recess of the legislature, the governor shall, as heretofore, have the power to fill such vacancy til the next succeeding session; provided, nevertheless, that all the powers, duties and liabilities of magistrates *ex officio*, shall continue heretofore, except the power to try small and mean causes; and every magistrate so appointed may exercise jurisdiction as heretofore throughout the judicial district in which such magistrate shall reside. The first appointment under this Act to be made at the next session of the General Assembly. Act 1846, 359, sec. 1st.

Every magistrate, before entering on the duties of his office, and within ninety days after his appointment, or before or during the next court of Common Pleas of his district, shall, before the clerk of the Common Pleas, for the district, in addition to the oath required by the fourth article of the Constitution of the State, take and subscribe the following oath: "I, A. B., do swear that I will not be of counsel to any person, in any cause depending before me; that I will, to the extent of my power and ability, enforce and carry into effect, the laws of force in this State, against gaming, and will bring to justice violations thereof, which may come within my view or knowledge, and that I will not receive or demand any fees whatever, in criminal cases, where the papers relating thereto have not been returned to the clerk, unless the same shall have been lost or mislaid—so help me God: and at the time of such qualification, shall sign a roll, to be kept by the said clerks. Act 1839, 14, sec. 2.

All persons who shall be chosen or appointed to any office of profit or trust, before entering on the execution thereof, shall take the following oath: "I do swear (or affirm) that I am duly qualified, according to the constitution of this State, to exercise the office to which I have been appointed, and will, to the best of my abilities, discharge the duties thereof, and preserve, protect, and defend the constitution of this State, and of the United States. 1 S. L., 190.

The acts of one appointed a magistrate, but who has not qualified according to law, are void. *State vs. Hayward*, 1st N. & M'C., 8.

2d. Their Duties, &c.

Each magistrate shall keep two books, the one for civil, the other for criminal cases, wherein he shall insert all his proceedings, in civil and

Qualification
and enrol-
ment.

Oath
required by
the consti-
tution.

Acts before
qualification.

To keep two
books, for
civil and

criminal
cases.

each case by its title, shewing the commencement, progress and termination thereof, as well as all fees charged or received by him, and shall produce the same when required, for the inspection of the solicitor of the circuit; and at the expiration of his term of office, shall deposit the same in the clerk's office for the district for which he was appointed. Act 1839, 14, sec. 5th.

Return of
papers to
Court of
Sessions.

All papers pertaining to the Court of Sessions, shall be returned by each magistrate to the clerk, at least ten days before the ensuing term of said Court, except such as may have been issued or received by him subsequent to that time, which shall be returned on the first day of the term, under the penalties prescribed by an Act, requiring magistrates and other officers to return recognizances and other documents for the Court of Sessions, and for other purposes, passed in the year of our Lord one thousand eight hundred and thirty-six; and every such paper shall be of a size not less than half a sheet of foolscap, folded in the manner that writs are when issued, and shall be indorsed legibly, with the title of the case, nature of offence, kind of proceeding, and name of the magistrate. Act 1839, 15, sec. 11.

Penalty for
default.

The penalties prescribed by said Act of 1836, are forfeiture of the fee or compensation, and a fine of five dollars within the discretion of the Court. 6th S. L., 553.

Power to
administer
oaths.

Every magistrate shall have power to administer any oath, authorized or required by law to be taken, and not directed to be administered by another authority; and any oath so administered, shall, to all intents and purposes, be binding and effectual in law. Act 1839, 20, sec. 20.

3d. Of their Disabilities, &c.

Justices pro-
hibited from
keeping
tavern, etc.

It shall not be lawful for any person exercising the office of a justice of the peace within this State, to keep any tavern, or to retail spirituous liquors, nor shall any license for retailing spirituous liquors be granted to any person exercising the office of a justice of the peace, nor to any person or persons in his house or family, or for his emolument; and if any person or persons shall offend against the true intent and meaning of this Act, he shall forfeit and pay the sum of fifty pounds to any person or persons who will inform or sue for the same, and be forever thereafter rendered incapable of serving in the office of a justice of the peace in this State. 7th S. L., 269, sec. 18.

Not to judge
in their own
case.

Regularly justices of the peace ought not to execute their office in their own case, but cause the offenders to be convened, or carried

ore some other justice, or desire the aid of some other justice being sent. Grimke, 277.

By Holt, Ch. J. M., 10 W., the Mayor of Hereford was laid by heels for sitting in judgement in a cause where he himself was sor of the plaintiff in ejectment, though he, by the charter, was a judge of the Court.—Ibid.

And as it is unjust, in many cases, for the magistrate to act in his n cause, so it is also imprudent; to which purpose the advice of rd Coke is applicable, who, upon the occasion of mentioning a cer- a judge, who made a settlement of his estate, which was void in r, and brought an action in his own name, which all the other ges, of his own showing in the Court, were of opinion did not lie, kes this observation, that it is not safe for any man (be he never learned,) to be of counsel with himself in his own cause, but to e advice of other great and learned men; and the reason he gives for that men are generally more foolish in their own concerns than those of other people.—Ibid.

But a magistrate is a proper judge of contempt, offered to himself the execution of his office. *Lining vs. Bentham*, 2d Bay, 1. But may for contempt.

And may issue a warrant for abusive words in relation to his office, d threats of personal injury to himself. *Edmondson vs. Frean*, 2d ill, 410.

Action on the case, against a justice of the peace, for improperly uing an execution, and causing plaintiff's horse to be seized and ld. The Acts of 1812 and 1817, "for giving landlords and lessors summary mode of regaining possession, &c., requires two justices execute it." Defendant acted alone, and issued execution for the sts. Held, that defendant was liable to an action, having acted without rsidiction; but that trespass and not case, was the proper remedy, e injury being direct. *Rembert vs. Kelly*, Harper R. 65. Acting without jurisdiction.

A magistrate having jurisdiction of the subject matter, cannot be ade liable in a civil action, unless fraud or collusion be shewn; and ch corruption must appear either from the grossness of the cumstances, or be proved *aliunde*. *Peake vs. Cantey*, 3d McCord, 17. But, if he have jurisdiction.

The Act of 1740, authorizing magistrates to seize and sell horses long to slaves, is constitutional, for slaves can hold no property, r sue or be sued; and the exercise of such authority, by a magis- ate, in determining whether the horse belonged to the slave or not, a judicial act.—Ibid.

Trespass on the case lies against a justice of the peace, for neg-

Liable for gross neglect.

lecting to pursue the plain directions of the Act of Assembly, respecting estrays, in which case he acts rather as a ministerial, than a judicial, officer, although he may err from pure ignorance. *Armstrong vs. Campbell*, 2d Brevard, 259.

Justices convicted for mal-practice, how punished.

If any justice of the peace or justice of the quorum, shall be convicted of any mal-practice in his office, before any Court of justice having competent jurisdiction, his office shall be of course vacated, and he shall be forever incapable of holding or exercising the office of justice of the quorum or of the peace, in this State. 5th S. L., 353, sec. 5th.

Liabilities for official misconduct.

The several magistrates in this State, in addition to any other penalty or liability they may incur, shall be subject to the penalties provided by an Act of the General Assembly, entitled an "Act for the punishment of official misconduct of district officers," passed in December, one thousand eight hundred and twenty-nine. Act 1839, 23, sec. 31.

Certain officers guilty of misconduct, to be indicted.

The said Act of 1829 provides, that if any public officer hereafter to be elected or appointed, whose authority is limited to a single election or judicial district, shall be guilty of any official misconduct, habitual negligence, habitual drunkenness, corruption, fraud or oppression, he shall be liable to indictment, in which the privilege of traverse shall not be allowed; and upon conviction thereof, shall be fined, not exceeding one thousand dollars, and imprisoned, not exceeding one year. 6th S. L., 390, sec. 1.

Office declared vacant.

It shall be the duty of the presiding judge, before whom such officer shall be tried, to cause a certified copy of the indictment to be immediately transmitted to the Governor, who shall, upon receipt thereof, declare, by proclamation, his office vacant, and the same shall be filled as in case of the death or resignation of the incumbent. *Ibid.*

4th. Protection, &c.

A justice is not to be slandered with impunity.

A justice of the peace is not to be slandered or abused; as appears by the following case. *M. 2, G. Aston and Blagrave*. The plaintiff declared, that he was a justice of the peace, and that upon a colloquium of him and the execution of his office, the defendant said, you are a rascal, a villain, and a liar. After verdict for the plaintiff, it was moved, in arrest of judgement, that these words are not actionable. It was urged for the plaintiff, there is a great difference between magistrates and common tradesmen; words of the

latter must affect them in their particular way of dealing; but any thing which tends to impeach the credit of the former, is actionable: and although an indictment might not lie for these words, as perhaps not tending to a breach of the peace, yet, nevertheless, they are actionable; for, in many cases, words are actionable, which are not indictable. After consideration, Pratt, C. J., delivered the opinion of the Court, that though rascal and villain were uncertain, yet, being joined with liar, and spoken of a justice of the peace, they imported a charge of acting corruptly and partially, and therefore there ought to be judgement for the plaintiff.—Ibid. 2d Burns, 585.

In the case of the Duke of Norfolk, H. 30, G. 3, Lord Kenyon declared, that, however magistrates may mistake the law, yet if they act with pure intentions, and not from any corrupt or occasional motives, but mean to distribute justice, fairly and impartially, they are not liable to a criminal information for what they do. 2d Burns, 588.

Justices, whose intentions are pure, are not liable to a criminal information.

And in the case of K. vs. Palmer, and Baine, esquires and others, E. 1, G. 3. Upon shewing cause why an information should not be granted against two justices of the peace and others, for a misdemeanor relating to the conviction of a poacher, and the circumstance, attending it; the Court, on consideration of the affidavits, discharged the rule, as to all the defendants; with costs to be paid to the justices, but without costs as to the others. And they were, upon this occasion, most explicit in their declaration, that even where a justice acts illegally, (which, however, was not the present case,) yet, if he has acted honestly and candidly, without oppression, malice, revenge, or any bad view, or ill intention whatsoever, the Court will never punish him in this extraordinary course of an information; but leave the party complaining, to their ordinary legal remedy or method of prosecution, by action or by indictment.—Ibid.

And no justice shall be liable to be punished both ways, that is, criminally and civilly; but before the Court will grant an information, they will require the party to relinquish his civil action, if any such is commenced. And even in the case of an indictment, and though the indictment is actually found, the attorney general (on application made to him) will grant a *noli prosequi* upon such indictment, if it appear to him that the prosecutor is determined to carry on a civil action at the same time. 2d Burns, 589.

Justices not to be proceeded against, both criminally and civilly.

If an action be brought against a magistrate for any thing done by virtue of his office, he may plead the general issue, and give the special

matter in evidence, and if he recovers, he shall have double costs. 3d S. L., 366.

MAIDENS.

[See ABDUCTION.]

MAIL.

Any person wilfully stopping the mail, shall, upon conviction, be fined.

If any person shall, knowingly and wilfully, obstruct or retard the passage of the mail, or of any driver or carrier, or of any horse or carriage, carrying the same, he shall, upon conviction, for every such offence, pay a fine not exceeding one hundred dollars; and if any ferryman shall, by wilful negligence, or refusal to transport the mail across any ferry, delay the same, he shall forfeit and pay, for every ten minutes that the same shall be so delayed, a sum not exceeding ten dollars. 3d Story's Laws U. S., 1987, sec. 9.

Any person receiving through fraud, more than the postage of a letter, &c., to be fined for every offence 100 dollars.

If any postmaster, or other person, authorized by the postmaster general to receive the postage of letters, shall fraudulently demand, or receive, any rate of postage, or gratuity, or reward, other than is provided by this Act, for the postage of letters, or packets, on conviction thereof, he shall forfeit, for every such offence, one hundred dollars.—Ibid, 1990, sec. 16.

No stage or other vehicle which regularly performs trips on post roads, &c. to convey letters, &c.

No stage or other vehicle, which regularly performs trips on a post road, or on a road parallel to it, shall convey letters; nor shall any packet boat or other vessel, which regularly plies on a water declared to be a post road, except such as relate to some part of the cargo. For the violation of this provision, the owner of the carriage or other vehicle, or vessel, shall incur the penalty of fifty dollars. And the person who has charge of such carriage, or other vehicle, or vessel, may be prosecuted under this section, and the property in his charge may be levied on and sold, in satisfaction of the penalty and costs of suit: *Provided*, that it shall be lawful for any one to send letters by special messenger.—Ibid, sec. 19.

Proviso.

If any person employed in any of the departments of the post-office establishment, shall unlawfully detain, delay, or open, any letter, packet, bag, or mail of letters, with which he shall be entrusted, or which shall have come to his possession, and which are intended to be conveyed by post; or, if any such person shall secrete, embezzle, destroy, any letter or packet entrusted to such person as aforesaid, and which shall not contain any security for, or assurance relating to money, as hereinafter described, every such offender, being thereof lawfully convicted, shall, for every such offence, be fined, not exceeding three hundred dollars, or imprisoned, not exceeding six months, or both, according to the circumstances and aggravations of the offence. And if any person, employed as aforesaid, shall secrete, embezzle, or destroy, any letter, packet, bag, or mail of letters, with which he or she shall be entrusted, or which shall have come to his or her possession, and are intended to be conveyed by post, containing any bank note, or bank post bill, or bill of exchange, warrant of the treasury of the United States, note of assignment of stock in the funds, letters attorney for receiving annuities or dividends, or for selling stock in the funds, or for receiving the interest thereof, or any letter of credit, or note for, or relating to payment of monies, or any bond, or warrant, draft, bill, or promissory note, covenant, contract, or agreement whatsoever, for or relating to, the payment of money, or the delivery of any article of value, or the performance of any act, matter, thing, or any receipt, release, acquittance, or discharge of, or from any debt, covenant, or demand, or any part thereof, or any copy of any record of any judgement, or decree, in any Court of law, or any writ, or any execution which may have issued thereon, or any copy of any other record, or any other article of value, or any writing representing the same; or if any such person, employed as aforesaid, shall steal, or take, any of the same out of any letter, packet, bag, or mail of letters, that shall come to his or her possession, such person shall, on conviction for any such offence, be imprisoned not less than one year, nor exceeding twenty-one years; and if any person who shall have taken charge of the mails of the United States, shall quit or desert the same before such person delivers it into the post-office at the termination of the route, or some known mail carrier, or agent of the general post-office, authorized to receive the same, every such person, so offending, shall forfeit and pay a sum not exceeding one hundred dollars, for every such offence; and if any person concerned in carrying the mail of the United States, shall collect, receive, or carry any letter, or packet, or shall cause or procure the

Persons employed in the post-office when they detain, etc., letters, etc., shall, on conviction, be fined or imprisoned.

same to be done, contrary to this Act, every such offender shall forfeit and pay for every such offence a sum not exceeding fifty dollars. Ibid, 1901, sec. 21.

Persons
robbing the
mail, etc., to
suffer death.

If any person shall rob any carrier of the mail of the United States, or other person entrusted therewith, of such mail, or of part thereof, such offender or offenders shall, on conviction, be imprisoned not less than five years, nor exceeding ten years; and, if convicted a second time of a like offence, he or they shall suffer death; or if, in effecting such robbery of the mail the first time, the offender shall wound the person having custody thereof, or put his life in jeopardy, by the use of dangerous weapons, such offender or offenders shall suffer death. And if any person shall attempt to rob the mail of the United States, by assaulting the person having custody thereof, shooting at him, or his horse or mule, or threatening him with dangerous weapons, and the robbery is not effected, every such offender, on conviction thereof, shall be punished by imprisonment, not less than two years, nor exceeding ten years. And, if any person shall steal the mail, or shall steal or take from, or out of, any mail, or from, or out of, any post-office, any letter or packet; or, if any person shall take the mail, or any letter or packet therefrom, or from any post office, whether with or without the consent of the person having custody thereof, and shall open, embezzle, or destroy, any such mail, letter, or packet, the same containing any article of value, or evidence of any debt, due, demand, right, or claim, or any release, receipt, acquittance, or discharge, or any other article, paper, or thing, mentioned and described in the twenty-first section of this Act; or, if any person shall, by fraud, or deception, obtain from any person having custody thereof, any mail, letter or packet, containing any article of value, or evidence thereof, or either of the writings referred to, or next above mentioned, such offender or offenders, on conviction thereof, shall be imprisoned not less than two, nor exceeding ten years. And if any person shall take any letter, or packet, not containing any article of value, or evidence thereof, out of a post office, or shall open any letter or packet, which shall have been in a post office, or in custody of a mail carrier, before it shall have been delivered to the person to whom it is directed, with a design to obstruct the correspondence, to pry into another's business or secrets; or shall secrete, embezzle, or destroy, any such mail, letter, or packet, such offender, upon conviction, shall pay, for every such offence, a sum not exceeding five hundred dollars, and be imprisoned not exceeding twelve months. Ibid, 1902, sec. 22.

If any person shall rip, cut, tear, burn, or otherwise injure, any

valise, portmanteau, or other bag, used, or designed to be used, by any person acting under the authority of the post-master general, or any person in whom his powers are vested, in a conveyance of any mail, letter, packet, newspaper, or pamphlet, or shall draw or break any staple, or loosen any part of any lock, chain, or strap, attached to, or belonging to any such valise, portmanteau or bag, with an intent to rob, or steal any mail, letter, packet, newspaper, or pamphlet, or to render either of the same insecure, every such offender, upon conviction, shall, for every such offence, pay a sum not less than one hundred dollars, nor exceeding five hundred dollars, or be imprisoned not less than one year, nor exceeding three years, at the discretion of the Court before whom such conviction is had. *Ibid*, sec. 23.

Every person who, from and after the passage of this Act, shall procure, and advise, or assist, in the doing or perpetration of any of the acts or crimes forbidden by this Act, shall be subject to the same penalties and punishments as the persons are subject to, who shall actually do or perpetrate any of the said acts or crimes, according to the provisions of this Act. *Ibid*, 1993, sec. 24.

Every person who shall be imprisoned by a judgement of Court, under and by virtue of the twenty-first, twenty-second, twenty-third, or twenty-fourth sections of this Act, shall be kept at hard labour during the period of such imprisonment. *Ibid*, sec. 25.

In the case of the *State vs. McBride, Rice, 400*, overruling the *State vs. Wells*, it was held, that the Courts of this State have no jurisdiction over offences against the foregoing Act. Therefore, all recognizances, and other papers, in capital cases, arising under the same, must be returnable to the Circuit Court of the United States, held at Charleston or Columbia, and in cases not capital, to the District Court of the United States, held at Charleston, or Laurens Court-house.

MAIM, OR MAYHEM.

1st. AT COMMON LAW.

2d. UNDER THE STATUTE.

1st. At Common Law.

Maim, at common law, is a bodily hurt, whereby a man is rendered less able, in fighting, to defend himself or to annoy his adversary.

Therefore, the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts, the loss of which, in all animals, abates their courage, are held to be maims: but the cutting off his ear, or nose, or the like, are not held to be maims at common law, because they do not weaken a man, but only disfigure him. In order to found an indictment of mayhem, the act must be maliciously, though it matters not how sudden the occasion. 1st Russell, 586.

No accessories in mayhem.

It should seem that there can be no accessories before the fact in mayhem, at common law; though there appears to have been some difference of opinion, or rather misapprehension, upon the subject. For, supposing the offence to be in the nature of an aggravated trespass only, the rule will apply, that in crimes under the degree of felony there can be no accessories, but that all persons concerned, if guilty at all, are principals. It does not appear to have been any where supposed, that there can be accessories after the fact in mayhem. 1st Russell, 586.

Mayhem, or the maiming of persons, was probably at one time an offence at common law, of the degree of felony: as the judgement was, *membrum pro membro*. But this judgement afterwards went out of use; partly because the law of retaliation is at best an inadequate rule of punishment; and partly because, upon a repetition of the offence, the punishment could not be repeated. The offence, therefore, appears to have been considered, in later times, as in the nature of an aggravated trespass; and the only judgement which now remains for it at common law, is fine and imprisonment. It is, however, a misdemeanor of the highest kind, and spoken of by Lord Coke as the greatest offence under felony. 1st Russell, 585.

2d. By Statute.

Malicious maiming made felony.

If any person or persons, from and after the 24th day of June, which shall be in the year of our Lord God, 1671, on purpose and of malice fore-thought, and by lying in wait, shall unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any subject of his Majesty, with intention, in so doing, to maim or disfigure, in any the manners before mentioned, such his Majesty's subject; that then and in every such case, the person or persons so offending, their counsellors, aiders and abettors, (knowing of, and privy to the offence, as aforesaid,) shall be and are hereby declared to be felons, and shall suffer death, as in cases of felony, without benefit of clergy. *Provided*, that

an attainder of such felony shall extend to corrupt the blood or forfeit the dower of the wife, or the lands, goods or chattels of the offender. d S. L., 521, sec. 7th.

There must be a *maiming*, and for this purpose a wound in the ^{Maiming.} breast, or on the neck, will not suffice to bring the offender within the statute. But to constitute a slitting the nose, it is not necessary that the nostrils should be perforated, for a wound across the upper part of the nose, on a level with the eyes, if it cuts the flesh, and divides the frontal vessels of the forehead, will fix the party by whom it was given, with the guilt of a capital felony. 4th Blackstone, 207, (note.)

There must be a *lying in wait*. But it is not necessary that the ^{Lying in} prisoner should lurk in any particular place, and effect the mischief ^{wait.} suddenly rushing from it. It will suffice if, having formed an intention to maim, he takes a convenient opportunity of effecting his purpose. And, therefore, where the party injured was surrounded by a gang of thieves, and in the scuffle, some of the party asked the rest where their knives were, on which the defendant struck at and maimed him, it was left to the jury to determine whether he had deliberate attention to wound, and they found him guilty. So, where the prisoner was in concert with pickpockets, to cut or stab those who would oppose them, and, in prosecution of this intention, he ran to a person who had apprehended one of his associates, and maimed him with a knife, this was holden to be a lying in wait within the statute. Where, however, the injury arises out of a sudden attack, though the prisoner is engaged in an unlawful purpose, the offence will not be capital. This was held where the defendant was stealing turnips, and on being accosted by a servant of the owner, struck him with an instrument of iron and wood, which he had with him. And where he commander of a press-gang wounded a person in the attempt to oppress him, who resisted, not being liable to be taken, though antecedent malice was proved, it was held, that a sufficient lying in wait had not been shewn. These cases shew the different construction put in the common and statute law, for in any of these cases, had death ensued, malice would have been implied, and the parties convicted of murder.—Ibid.

There must be an *intent to disfigure*. But if the design was to ^{Intent to} murder by maiming, and the party, though wounded, recovers, this ^{disfigure.} deeper guilt will be no excuse, for the primary intent to maim will not be merged in the ultimate design to kill. And the question of intent is matter of fact for the consideration of the jury, and not a point of law for the decision of the judge. It is not necessary that

the intention to maim should be directed against any particular individual; for if it be general against any person who may resist an unlawful purpose, the offender will be liable, though the party injured be a stranger.—Ibid.

MALICIOUS MISCHIEF.

[See BURNING, CATTLE, &c.]

Penalty for cutting the head of any several waters.
 Burning a cart laden.
 Burning a heap of wood prepared for coals.
 Cutting out the tongue of a beast.
 Cutting off the ears of another.
 Barking of fruit trees.

If any person or persons, maliciously, wilfully and unlawfully, cut or cause to be cut out the head or heads, dam or dams of any ponds, pools, motes, stews, or other several waters, or the head or heads, pipe or pipes of any conduit, or conduits, of any other person or persons; or maliciously, willingly and unlawfully, burn or cause to be burned, any wain or wains, cart or carts, laden or to be laden with coals or any other goods or merchandizes of any other person or persons; or maliciously, willingly and unlawfully, do burn or cause to be burned, any heap or heaps of wood of any other person or persons, prepared, cut and felled, or to be prepared, cut and felled, for making of coals, billets or talwood; or maliciously, willingly and unlawfully, cut out or cause to be cut out, the tongue or tongues of any tame beast, or beasts of any other person or persons, the said beasts then being in life; or maliciously, willingly and unlawfully, cut or cause to be cut off the ear or ears of any of the king's subjects, otherwise than by authority of the law, chance-medley, sudden affray or adventure; or maliciously, willingly or unlawfully bark any apple trees, pear trees, or other fruit trees, of any other person or persons; that then every such offender and offenders shall not only loose and forfeit unto the party grieved, treble damages for such offence or offences, the same to be recovered by action of trespass, to be taken at the common law, but also shall lose and forfeit to the King's Majesty, and his heirs, for every such offence, ten pound sterling, in name of a fine. 2d S. L., 478, sec. 4.

MANSLAUGHTER.

[See HOMICIDE.]

MARKS OR BRANDS.

[See CATTLE.]

MASTER AND SLAVE.

1st. PENALTY FOR CONCEALING ACCUSED SLAVES.

2d. TREATMENT OF SLAVES.

3d. PENALTY FOR BRINGING ONE INTO THE STATE, CONTRARY TO LAW.

4th. LIABILITIES OF OWNER, FOR NECESSARIES AND MEDICINES, FURNISHED HIS SLAVE.

5th. WHEN OWNER IS LIABLE FOR DAMAGES DONE BY HIS SLAVE.

6th. WAGES OF SLAVE, AND LIABILITY OF HIRER.

1st. Penalty for Concealing, &c.

In case the master or other person having charge or government of any slave, who shall be accused of any capital crime, shall conceal or convey away any such slave, so that he cannot be brought to trial and condign punishment, every master or other person so offending, shall forfeit, on conviction thereof, one thousand dollars, and suffer imprisonment at the discretion of the Court, not exceeding twelve months, which forfeiture, aforesaid, shall not be barred for want of prosecution at any time within two years after the commission of such offence; but if such slave shall be accused of a crime not capital, then such master or other person shall only forfeit the sum of thirty dollars. Act 1843, 257, and 7th S. L., 403, sec. 20th.

2d. Treatment, &c.

If any person shall, on a sudden heat or passion, or by undue correction, kill his own slave, or the slave of any other person, he shall forfeit the sum of three hundred and fifty pounds, current money. Penalty for killing, or cruelly using a slave. And in case any person or persons shall wilfully cut out the tongue, put out the eye, castrate, or cruelly scald, burn, or deprive any slave of any limb or member, or shall inflict any other cruel punishment, other than by whipping or beating with a horse-whip, cow-skin, switch or small stick, or by putting irons on, or confining or imprison-

ing such slave, every such person shall, for every such offence, forfeit the sum of sixty dollars. 7th S. L., 411, sec. 37.

Slaves to be provided with sufficient clothing and food.

In case any person in this Province, who shall be owner, or shall have the care, government or charge of any slave or slaves, shall deny, neglect or refuse to allow such slave or slaves, under his or her charge, sufficient clothing, covering or food, it shall and may be lawful for any person or persons, on behalf of such slave or slaves, to make complaint to the next neighboring justice, in the parish where such slave or slaves live or are usually employed; and if there shall be no justice in the parish, then to the next justice in the nearest parish; and the said justice shall summons the party against whom such complaint shall be made, and shall enquire of, hear and determine the same; and if the said justice shall find the said complaint to be true, or that such person will not exculpate or clear himself from the charge, by his or her own oath, which such person shall be at liberty to do, in all cases where positive proof is not given of the offence, such justice shall and may make such orders upon the same, for the relief of such slave or slaves, as he in his discretion shall think fit, and shall and may set and impose a fine or penalty on any person who shall offend in the premises, in any sum not exceeding twelve dollars for each offence, to be levied by warrant of distress and sale of the offender's goods, returning the overplus, if any shall be; which penalty shall be paid to the church-wardens of the parish where the offence was committed, for the use of the poor of the said parish.—Ib., sec. 38.

In case of cruelty to slave, the owner how to be dealt with.

If any slave shall suffer in life, limb or member, or shall be maimed, beaten or abused, contrary to the directions and true intent and meaning of this Act, when no white person shall be present, or being present, shall neglect or refuse to give evidence, or be examined upon oath, concerning the same; in every such case, the owner or other person who shall have the care and government of such slave, and in whose possession or power such slave shall be, shall be deemed, taken, reputed and adjudged to be guilty of such offence, and shall be proceeded against accordingly, without further proof, unless such owner or other person, as aforesaid, can make the contrary appear by good and sufficient evidence, or shall; by his own oath, clear and exculpate himself; which oath, every Court, where such offence shall be tried, is hereby empowered to administer, and to acquit the offender accordingly, if clear proof of the offence be not made by two witnesses at least; any law, usage or custom, to the contrary notwithstanding.—Ibid, sec. 39.

If any owner of slaves, or other person who shall have the care,

management or overseeing of any slaves, shall work or put to labor any such slave or slaves, more than fifteen hours in four and twenty hours, from the twenty-fifth day of March to the twenty-fifth day of September, or more than fourteen hours in four and twenty hours, from the twenty-fifth day of September to the twenty-fifth day of March, every such person shall forfeit any sum not exceeding twelve dollars, nor under three dollars, for every time he, she or they shall offend herein, at the discretion of the justice before whom such complaint shall be made. Ibid, 413, sec. 44.

3d. Penalty for bringing one into the State, contrary to law.

It shall not be lawful for any citizen of this State, or other person, to bring into this State, under any pretext whatever, any slave or slaves from any port or place in the West Indies, or Mexico, or any part of South America, or from Europe, or from any sister State situated to the north of the Potomac river, or the city of Washington. Neither shall it be lawful for any person to bring into this State, as a servant, any slave who has been carried out of the same, if, at any time during the absence of such slave from this State, he or she hath been in ports or places situated in Europe, in the West Indies, or Mexico, or any part of South America, or in any State North of the Potomac, or city of Washington; and any person who shall bring into this State any slave, contrary to the meaning of this Act, shall forfeit and pay the sum of one thousand dollars, for each such slave, to be recovered in an action of debt, in any Court having jurisdiction; and each and every such slave shall be forfeited as is hereinafter provided by this Act: *provided*, that nothing herein contained shall prevent any owner from bringing into the State any run-away slave who may have been taken. 7th S. L., 472.

Not lawful to bring slaves from foreign parts.

Slaves taken out of the State, cannot be brought back again.

Penalty.

It shall and may be lawful for any white person, on the arrival of any slave into this State, from any other State or foreign port, to arrest and carry him or her before some magistrate of the district or parish where he or she may be taken; and it shall be the duty of the sheriff, or any constable of the district or parish into which such slave shall be brought, as aforesaid, on information given, to arrest any slave arriving, brought or introduced into this State from any other State, or foreign port, and carry him or her before some magistrate, as aforesaid, who shall forthwith commit such slave or slaves to prison, and there keep him or her until the owner, or person introducing such slave or slaves into this State, shall make oath, that at no time during the absence of such slave or slaves from this State, he, she, or

Power to arrest.

Method of
forming
Court.

Slave to be
forfeited.

they have been in any port or place prohibited by this Act. And should such owner or person introducing such slave or slaves, neglect or refuse to make such oath, for the space of ten days after he or she shall have received notice of the arrest of such slave or slaves, and of the cause thereof, it shall be the duty of the magistrate aforesaid, to form a court of two magistrates and five freeholders, and on proof, to the satisfaction of such Court, that such slave or slaves have been beyond the limits of this State, and that such owner or persons who shall have introduced them into this State, as aforesaid, after having been duly served with the notice of such slaves having been arrested, as aforesaid, and of the cause of such arrest, has neglected or refused to make oath as aforesaid, it shall then be lawful for said Court to order the said slave or slaves to be sold at public sale, and the proceeds of such sale shall go and be appropriated, one half to the State, and the other half to the use of the informer.—Ib.

By the case of *Kohne vs. Simons, et al.*, 2d Spears, 761, it is settled, that the above Act, so far as it confers power on the Court of magistrates and freeholders to try the forfeiture of and sell such slaves, is unconstitutional and void.

4th. *Liability of Owner, &c.*

Where the owner of a female slave had cruelly beaten her, and had driven her away from his house and plantation, and exposed her to perish for want of food, and from the pains of her bruises; and a neighboring physician, from motives of humanity, had taken the slave under his protection, and had afforded her medical and other relief; it was adjudged that this action might be maintained, to recover from the owner a recompense for medicine and attendance, and for the sustenance of the wench during her illness, notwithstanding the defendant had forbidden the plaintiff to receive the slave, or give her any assistance. *Fairchild vs. Bell*; 2d Brevard, 129.

The master is liable for medical or surgical assistance rendered to his slave, when the latter was in extreme peril, by a person called in, at the instance of the slave, without the knowledge or consent of the master: and it makes no difference, that the master, in anticipation of such assistance being necessary, had directed the slave to engage the services of another person, who would have afforded them on cheaper terms, if no such person were in attendance when the services were needed. *Johnson vs. Barrett*; 2d Bailey, 562.

The vendee of the slaves gave notice to the plaintiff, of his intention to decline all responsibility for the support of one of them, under their

care, from the time of the verdict, but being the owner, and having abandoned the slave, he was held liable upon an implied contract, for the expenses of maintainance, as well before as after the notice, to be assessed by a jury under the circumstances. *C. C. Charleston vs. Cohen*, 2d Spear, 408.

5th. When Owner is liable for Damages, &c.

A master is liable for injuries to third persons arising from the negligence of his servant, or the negligence or misfeasance of his slave, whilst in the lawful and authorized employment of the master. *O'Connell vs. Strong, Dudley*, 265. Liable for negligence.

That a master is liable for an injury done by his servant while in the discharge of a duty in the business of his master, may be admitted as a general principle, with this exception, that where the act is voluntary and wilful, it amounts to a trespass, and the master is not liable. This doctrine is one said to be founded on principles of public policy, but the reason why the master should be held liable for the negligence of his servant and not for his wilful conduct, is difficult to see. In this case, the Court being of opinion that the injury resulted from the wilful act of the defendant's servant, or that the defendant's servant and the plaintiff were equally in fault, set aside the verdict obtained by plaintiff, and granted a new trial. *O'Neill vs. Reigne*, MSS. Dec. 1827; 2d Rice's Digest, 93. Not for trespass.

6th. Of Hirer.

Where a person who hires a slave sends for a physician to attend him while sick, the person so employing the doctor, and not the owner of the slave, is liable to the physician. From the nature of the bailment, the obligation is imposed on the person hiring the slave. *Wells vs. Kennerly*; 4th M'Cord, 123.

This liability may be changed by the custom of a place, every well known custom being a part of the contract; and where it is usual, as in Charleston, for the owner to employ their physician, the compliance with such custom is implied in every hiring.

Where a slave hired for a year, dies within the year, his wages must be apportioned. *Bacot vs. Parnell*; 2d Bailey, 424. Wages apportioned.

The hiring of a slave for a year is the purchase of him for that time, and the loss of service occasioned by the running away of the slave, must fall upon the hirer, in the absence of any special contract on the subject; this decision, however, does not preclude an inquiry into any Not when slave runs away.

LAW OF MAGISTRATES.

circumstances of fraud or misrepresentation which may attend the transaction. *Stinson vs. Wren*; 2d Rice's Digest, 94.

If a slave runs away during the term for which he is hired, without fault on the part of the owner, the hirer must sustain the loss. *Wilder vs. Richardson*; 2d Rice's Digest, 95.

M I L L S.

Toll allowed
for grinding
grain.

No person shall take more toll for grinding corn, wheat, rye, or any other grain, into good meal or flour, than one eighth part for any quantity under ten bushels, and for ten bushels, or any quantity above, at one time brought, one tenth part only; and all grain as aforesaid, chopped for homony, feeding stock, or for distilling, one sixteenth part. 4th S. L., 652, sec. 1.

Penalty.

Any person or persons taking more toll than hereinbefore directed, shall be subject to pay a fine to the amount of ten times the value of the toll so taken, to be recovered in the most summary way, before the nearest magistrate; one half to the prosecutor, and the other half to the person aggrieved. *Ibid*, sec. 2.

MITIGATION OF PUNISHMENT.

[See SLAVES.]

M U R D E R.

[See HOMICIDE.]

N U I S A N C E,

Properly signifies any thing that worketh hurt, inconvenience or damage, and may be either public or private.

A private nuisance may be defined, as any thing done to the annoyance or hurt of another, or which hinders his enjoyment of his lands, tenements or hereditaments. Private.

A public nuisance is an offence against the public, either by doing a thing to the annoyance or hurt of all citizens, or by neglecting to do a thing which the common good requires. Of which we inquire, Public.

1st. WHAT SHALL BE DEEMED A NUISANCE.

2d. HOW REMOVED OR ABATED.

3d. HOW PUNISHABLE.

1st. What shall be deemed a Nuisance.

Offensive trades and manufactures may be public nuisances. A brew-house, erected in such an inconvenient place, that the business cannot be carried on without greatly incommoding the neighborhood, may be indicted as a common nuisance; and so in the like case may a glasshouse, or swineyard. With respect to a candle manufactory, it has been holden, that it is no common nuisance to make candles in a town, because the needfulness of them shall dispense with the noisomeness of the smell; but the reasonableness of this opinion seems justly to be questionable, because, whatever necessity there may be that candles be made, it cannot be pretended that it is necessary to make them in a town. 1st Russell, 296. Offensive trades and manufactures.

It seems, that erecting gunpowder mills, or keeping gunpowder magazines near a town, is a nuisance by the common law, for which an indictment or information will lie. 1st Russell, 297. Gunpowder and combustibles.

All disorderly inns or ale-houses, bawdy-houses, gaming-houses, play-houses, unlicensed, or improperly conducted, booths and stages for rope dancers, mountebanks, and the like, are public nuisances, and may therefore be indicted. It seems to be agreed, that the keeper of an inn may, by the common law, be indicted and fined as being guilty of a public nuisance, if he usually harbor thieves, or persons of scandalous reputation, or suffer frequent disorders in his house, or take exorbitant prices, or set up a new inn in a place where there is no manner of need of one, to the hinderance of other ancient and well governed inns, or keep it in a place in respect of its situation, wholly unfit for such a purpose. And it seems also to be clear, that if one who keeps a common inn, refuse either to receive a traveller, as a guest into the house, or to find him victuals or lodging, upon his tendering him a reasonable price for the same, he is not only liable to render damages to the Disorderly inns, etc.

party in an action, but may also be indicted and fined at the suit of the king; and it is also said, that he may be compelled by the constable of the town, to receive and entertain such a person as his guest; and that it is in no way material whether he have any sign before his door or not, if he make it his common business to entertain passengers. 1st Russell, 298.

Bawdy
houses.

It is clearly agreed, that keeping a bawdy-house, is a common nuisance, as it endangers the public peace, by drawing together dissolute and debauched persons; and also has an apparent tendency to corrupt the manners of both sexes, by such an open profession of lewdness. And it has been adjudged that this is an offence of which a *feme covert* may be guilty as well as if she were *sole*, and that she, together with her husband, may be convicted of it; for the keeping the house does not necessarily import property, but may signify that share of government which the wife has in a family, as well as the husband; and in this she is presumed to have a considerable part, as those matters are usually managed by the intrigues of her sex. If a person be only a lodger, and have but a single room, yet, if she make use of it to accommodate people in the way of a bawdy-house, it will be the keeping of a bawdy-house, as much as if she had a whole house. But an indictment cannot be maintained against a person for being a common bawd, and procuring men and women to meet together to commit fornication; the indictment should be for keeping a bawdy-house. For the bare solicitation of chastity is not indictable, but cognizable only in the ecclesiastical Courts. 1st Russell 299.

Common
gaming
houses.

It is clearly agreed, that all common gaming-houses are nuisances in the eye of the law, being detrimental to the public, as they promote cheating and other corrupt practices, and incite to idleness, and avaricious ways of gaining property, great numbers, whose time might otherwise be employed for the good of the community. And in a late case it was held, that the keeping a common gaming-house, and for lucre and gain, unlawfully causing and procuring divers idle and evil-disposed persons to frequent and come to play together at a game called *rouge et noir*," and permitting the said idle and evil disposed persons to remain playing at the same game for divers large and excessive sums of money, is an indictable offence at common law. It has also been adjudged, that it is an offence for which a *feme covert* may be indicted; for, as she may be concerned in acts of bawdry, as has been observed above, so she may be active in promoting gaming, and furnishing the guests with conveniences for that purpose. There

are also certain penalties imposed by statutes upon the offence of keeping a common gaming-house.—Ibid.

A common scold, *communis rixatrix*, (for our law confines it to the feminine gender,) is a public nuisance to her neighborhood, and may be indicted for the offence; and upon conviction, punished by being placed in a certain engine of correction, called the trebucket, or cucking stool. 1st Russell, 303. Common scold.

A defendant was convicted on an indictment for making great noises in the night, with a speaking trumpet, to the disturbance of the neighborhood: which the Court held to be a nuisance. The exposing in public places, persons infected with contagious disorders, so that the infection may be communicated, is a nuisance.—Ibid. Noises in the night.

It is said that a mastiff going in the street unmuzzled, from the ferocity of his nature, being dangerous, and cause of terror to citizens, seems to be a common nuisance; and that, consequently, the owner may be indicted for suffering him to go at large.—Ibid. Mastiff unmuzzled.

There is no doubt but that all injuries whatsoever to a highway, as by digging a ditch, or making a hedge across it, or laying logs of timber in it, or by doing any other act which will render it less commodious to citizens, are public nuisances at common law. And it is clearly a nuisance at common law to erect a new gate in a highway, though it be not locked, and opened and shut freely; because it interrupts the people in that free and open passage which they before enjoyed, and were lawfully entitled to; but where such a gate has continued time out of mind, it shall be intended that it was set up at first by consent, on a composition with the owner of the land, on the laying out the road; in which case, the people had never any right to a freer passage than what they continue to enjoy. 1st Russell, 317. Of nuisances to highways by obstruction.

It is a common nuisance to divert part of a public navigable river, whereby the current of it is weakened and made unable to carry vessels of the same burthen as it could before. And the laying timber, in a public river, is as much a nuisance, where the soil belongs to the party, as if it were not his, if thereby the passage of vessels is obstructed. The placing a floating dock in a public river, has also been held to be a nuisance, though beneficial in repairing ships. 1 Russ., 340. Obstructions in public rivers.

It will be no excuse for the defendant that the nuisance, for which he is indicted, has been in existence for a great length of time; as however, twenty years acquiescence may bind parties, whose private rights only are affected, yet the public have an interest in the sup- The defendant cannot excuse himself by showing that the nuisance has existed

for a long
time.

No length of
time will
legalize a
public
nuisance.

pression of public nuisances, though of longer standing. It has been held, that a party could not defend the putting his woodstack in the street before his house, on the ground that it was according to the ancient usage in the town, leaving sufficient room for passengers; for it is against law to prescribe for a nuisance. And Lord Ellenborough, C. J., said in a late case, "It is immaterial how long the practice may have prevailed, for no length of time will legitimate a nuisance. The stell fishery across the river at Carlisle, had been established for a vast number of years. But Mr. Justice Buller held, that it continued unlawful, and gave judgement that it should be abated." But in some cases, length of time may concur with other circumstances in preventing an obstruction from having the character of a nuisance: as where, upon an indictment for obstructing a highway, by depositing bags of clothes there, it appeared that the place had been used for a market for the sale of clothes for above twenty years, and that the defendant put the bags there for the purpose of sale; Lord Ellenborough, C. J., said, that after twenty years acquiescence, and it appearing to all the world that there was a fair or market kept at the place, he could not hold a man to be criminal, who came there under the belief that it was such fair, or market, legally instituted. 1st Russell, 305.

2d. Removal or Abatement.

Of the
removal of
nuisances.

It is laid down in the books, that any one may pull down, or otherwise destroy, a common nuisance; and it is said that if any one, whose estate is, or may be, prejudiced by a private nuisance, may justify the entering into another's ground, and pulling down and destroying such nuisance, surely it cannot but follow *a fortiori*, that any one may lawfully destroy a common nuisance. And it is also said, that it seems that in a plea, justifying the removal of a nuisance, the party need not show that he did as little damage as might be: but this may perhaps be doubted, as even where there is a judgement to abate a nuisance, it is only to abate so much of the thing as makes it a nuisance. 1st Russell, 304.

3d. How Punished.

Of the judge-
ment in cases
of nuisance.

All common nuisances are regularly punishable by fine and imprisonment; but, as the removal of the nuisance is the chief end of the indictment, the Court will adapt the judgement to the nature of the case. Where the nuisance, therefore, is stated in the indictment to be continuing, and does in fact exist at the time of the judgement, the

defendant may be commanded by the judgement to remove it at his own costs: but only so much of the thing as causes the nuisance ought to be removed; as if a house be built too high, only so much of it as is too high should be pulled down; and if the indictment were for keeping a dye-house, or carrying on any other stinking trade, the judgement would not be to pull down the building where the trade was carried on. So in the case of a glass-house, the judgement was to abate the nuisance; not by pulling the house down, but only by preventing the defendant from using it again as a glass-house. But where the indictment does not state the nuisance to be continuing, a judgement to abate it would not be proper. In cases where this point arose, Lord Kenyon, C. J., said, "when a defendant is indicted for an existing nuisance, it is usual to state the nuisance and its continuance down to the time of taking the inquisition; it was so stated in *lex vs. Pappineau, et adhuc existit*; and in such cases the judgement should be that the nuisance be abated. But in this case it does not appear in the indictment that the nuisance was then in existence; and it would be absurd to give judgement to abate a supposed nuisance which does not exist. If, however, the nuisance still continue, the defendant may be again indicted for continuing it. 1st Russ., 306.

If a man is annoyed by a private nuisance, he shall have his action upon the case, and recover his damages; but, if it is a public nuisance, he shall not have an action upon the case; the law having made this provision to prevent a multiplicity of suits; for if any one might have an action, all men might have the like: but the law for his common nuisance has provided an apt remedy, by presentment or indictment at the suit of the king, in behalf of all his subjects; unless any man has a particular damage; as if he and his horse fall into a ditch made across a highway, whereby he received hurt and loss; here for his special damage, which is not common to others, he shall have an action upon the case. 3d Burns, 186.

In general, the remedy for a nuisance on a highway, is by indictment; but if, by such nuisance, a party suffer a particular damage, an action lies; but the damage must be direct, and not consequential. *Grey vs. Brooks*; 1st Hill, 365.

Proceedings
on public
and private
nuisances.

O F F I C E S .

1st. OF BUYING AND SELLING AN OFFICE.

2d. OF FORFEITURE OF OFFICE.

1st. *Of Buying, &c.*

The buying
and selling
of offices
forbidden.

If any person or persons at any time hereafter, bargain or sell any office or offices, or deputation of any office or offices, or any part or parcel of any of them; or receive, have or take any money, fee, reward or other profit, directly or indirectly, or take any promise, agreement, covenant, bond, or any assurance to receive or have any money, fee, reward or other profit, directly or indirectly, for any office or offices, or for the deputation of any office or offices, or any part of any of them, or to the intent that any person should have, exercise or enjoy any office or offices, or the deputation of any office or offices, or any part of any of them, which office or offices, or any part or parcel of them, shall in any wise touch or concern the administration or execution of justice, or the receipt, controlment or payment of any of his majesty's treasure, money, rent, revenue, account, auditorship or surveying of any of the king's majesty's lands, tenements, woods or hereditaments, or the keeping of any of the king's majesty's castles or fortresses, being used, occupied or appointed for a place of strength and defence, or which shall touch or concern any clerkship to be occupied in any manner of court of record wherein justice is to be ministered, that then all and every such person and persons that shall so bargain or sell any of the said office or offices, deputation or deputations, or that shall take any money, fee, reward or profit for any of the said office or offices, deputation or deputations of any of the said offices, or any part of any of them, or that shall take any promise, covenant, bond or assurance for any money, reward or profit to be given for any of the said office or offices, deputation or deputations of any of the said office or offices, or any part of any of them, shall not only lose and forfeit all his and their right, interest and estate, which such person or persons shall then have of, in, or to any of the said office or offices, deputation or deputations, or any part of any of them, or of, in, or to the gift or nomination of any of the said office or offices, or for the deputation or deputations of which office or offices, or for any part of any of them, any such persons shall so make any bargain or sale, or take or receive any sum of money, fee, reward or profit, or any promise, covenant, bond or assurance to have or receive any fee, reward, money or profit; but also that all and every such person or

persons that shall give or pay any sum of money, reward or fee, or shall make any promise, agreement, bond or assurance, for any of the said offices, or for the deputation or deputations of any of the said office or offices, or any part of any of them, shall immediately, by and upon the same fee, money or reward given or paid, or upon any such promise, covenant, bond or agreement, had or made for any fee, sum of money or reward, to be paid as is aforesaid, be adjudged a disabled person in the law to all intents and purposes, to have, occupy or enjoy the said office or offices, deputation or deputations, or any part of any of them, for the which any such person or persons shall so give or pay any sum of money, fee or reward, or make any promise, covenant, bond, or other assurance to give or pay any sum of money, fee or reward. 3d S. L., 468, sec. 1.

If any person or persons do hereafter offend in any thing contrary to the tenor and effect of this Act, yet that notwithstanding, all judgments given, and all other Act and Acts executed or done by any such person or persons so offending by authority or color of the office or deputation which ought to be forfeited, or not occupied, or not enjoyed, by the person so offending as is aforesaid, after the said offence so by such person committed or done, and before such person so offending, for the same offence be removed from the exercise, administration and occupation of the said office or deputation, shall be and remain good and sufficient in law to all intents, constructions and purposes, in such like manner and form as the same should or ought to have remained and been if this Act had never been had or made. Ibid, sec. 2d.

Acts done
by a delin-
quent officer
not avoided.

2d. Forfeiture, &c.

In general, all wilful breaches of the duty of an office are forfeitures of it, and punishable by fine, &c.; for since every office is instituted, not for the sake of the officer, but for the good of some other, nothing can be more just, than that he, who either neglects or refuses to answer the end for which his office was ordained, should give way to others who are both able and willing to take care of it, and that he should be punished for his neglect or oppressive execution; but the particular instances wherein a man may be said to act contrary to the duty of his office, though various, are yet so generally obvious, that it is needless to enumerate them. 2d Tomlins, 671.

There are, says Lord Coke, three causes of forfeiture or seizure of offices by matter in deed; 1st, by abuser; 2d, non-user; 3d, refusal.

1st. Abuser; as by a marshal or other jailor's permitting escapes.

2d. By non-user; in which there is this difference; when the office concerns the administration of justice or the commonwealth, the officer *ex officio* ought to attend without request, there by non-user or non-attendance, the office is forfeited; but where an officer is not obliged to attend, but upon demand or request made by him whose officer he is, there without such demand or request there can be no forfeiture; and herein also, Lord Coke, in another place, takes the following diversity, viz: that non-user, of itself, without some special damage, is no forfeiture of private offices, but that it is otherwise of a public one, which concerns the administration of justice.

3d. As to refusal, he says, that in all cases where an officer is bound upon request to exercise his office, if he does not do it upon request, he forfeits it; as if the steward of a manor be requested by the lord to hold a court, if he does not do it, it is a forfeiture. 2d Tomlins, 669 and 70.

Impeach-
ments.

The governor, lieutenant governor, and all civil officers, shall be liable to impeachment for high crimes and misdemeanors, for any misbehaviour in office, for corruption in procuring office, or for any act which shall degrade their official character; but judgement in such cases shall not extend further than to removal from office, and disqualification to hold any office of honor, profit or trust, under this State. The party convicted shall nevertheless be liable to indictment, trial, judgement and punishment, according to law. 6th S. L., 356, sec. 3.

District
officers;

All civil officers, whose authority is limited to a single election district, a single judicial district, or part of either, shall be appointed, hold their office, be removed from office, and in addition to liability to impeachment, may be punished for official misconduct, in such manner as the legislature, previous to their appointment, may provide. Ibid, 357, sec. 4.

Office may be
declared
vacant for
disability.

If any civil officer shall become disabled from discharging the duties of his office, by reason of any permanent bodily or mental infirmity, his office may be declared to be vacant, by joint resolution agreed to by two-thirds of the whole representation in each branch of the legislature; *provided*, that such resolution shall contain the grounds for the proposed removal, and, before it shall pass either House, a copy of it shall be served on the officer, and a hearing be allowed him. Ibid, sec. 5.

P A T R O L .

1st. WHO ARE LIABLE TO PATROL DUTY, AND PENALTY FOR NOT PERFORMING.

2d. HOW REGULATED.

3d. THEIR POWERS AND DUTIES.

4th. THEIR LIABILITIES AND PRIVILEGES.

1st. *Who are Liable, &c.*

All free white aliens, or transient persons, above the age of eighteen, and under the age of forty-five years, who have resided, or may hereafter reside in this State, for the term of six months, shall immediately thereafter, be and are hereby declared to be subject and liable to do and perform all patrol and militia duty, which shall or may be required by the commanding officer of the beat or district, in which such alien or transient person shall reside, and be subject and liable to all pains and penalties inflicted by this Act, for the non-performance of patrol or militia duty; any law, usage, or custom, to the contrary thereof, in any wise notwithstanding; no officer, either of infantry, cavalry, or artillery, shall be excused from the performance of patrol duty; but every officer, either of cavalry, infantry, or artillery, and every private, shall be liable to perform patrol duty in the beat, under the captain of said beat, within which such officer or private resides. *Provided* always, that nothing contained in this Act, shall be construed to extend to or affect in any way or manner, the natural born citizen of any State, or potentate, who shall be actually engaged in war with the United States, or to compel such alien or transient person, to serve on patrol or militia duty, out of the particular district of the regiment to which he shall or may be attached. Act 1839, 58, sec. 1st.

Aliens and militia officers liable to patrol duty.

It shall be lawful for any person or persons hereby declared liable to perform patrol duty, to send any able-bodied white man, other than a person liable to do duty at the same time, between the ages of eighteen and sixty, to perform patrol duty for him or them; and if any patrol man shall neglect or refuse to perform the duty required of him by this Act, or to procure a substitute to perform the same, without a legal excuse, he shall forfeit and pay a fine of two dollars for each and every such default, and ten per cent. on his general tax for the year preceding, paid by him, on the property owned by him in the district or parish in which he is a defaulter, to be inflicted by a court

Persons liable to patrol duty, may send a substitute, and penalty for not performing.

martial of the regiment, in which the offender may reside.—*Ibid*, 59, sec. 9.

A white man to be kept on each plantation.

Penalty.

Every owner of any settled plantation, shall employ and keep on such plantation, some white man capable of performing patrol duty, under the penalty of fifty cents per head, per month, for each and every working slave, which may be on such plantation, to be recovered by indictment, one half to the informer, and the other half to the use of the State: *Provided*, always, that nothing herein contained shall be construed to affect any person or persons, who resides on his, her or their plantation, for the space of six months in the year, or who shall employ less than fifteen working slaves on such plantation, or any owner of a plantation who shall reside in the vicinity thereof, and shall regularly perform patrol duty in the patrol beat in which such plantation is situated. Act 1842—220.

2d. How Regulated.

Captains of beat companies to lay off their beats into patrol districts.

It shall be the duty of the captains, or officers in command of the several beat companies in this State, to cause their respective beats to be divided into convenient patrol districts, which divisions, when made, shall be permanent, until the same shall be altered by the majority of the officers of said companies; and in case the captain, or officer in command, of any beat company, shall neglect to perform the duty herein required of him, he shall forfeit and pay the sum of thirty dollars, to be recovered in any Court having competent jurisdiction. Act 1839, 58, sec. 2.

Make out roll for each patrol district.

It shall be the duty of the commanding officer of each and every beat company, to cause to be made out, a roll for each patrol district, which shall include the names of all free white male inhabitants above the age of eighteen years, residing within the said patrol district; *Provided*, that nothing herein contained shall be construed to compel any male inhabitant of any beat company, to perform patrol duty, either in person or by substitute, who may have attained the age of forty-five years or upwards, and who shall not possess any slave or slaves.—*Ibid*, sec. 3.

And detail persons to do duty.

It shall be the duty of the commanding officer of each and every beat company, at every petty muster, to prick off from the roll of each patrol district, at his discretion, any number of persons, who shall perform the duty hereinafter prescribed, until the next regular petty muster; and to every patrol, the commanding officer of the company shall appoint some prudent and discreet person a commander; and in case the commanding officer of the company shall fail to prick off

uch patrol, or the commanders of the patrol shall fail to perform the duties herein required of them, they shall respectively forfeit and pay a sum not exceeding thirty dollars.—Ibid, sec. 4.

Whenever, from any cause, any beat company in any district or parish in this State, shall be without commissioned officers for the term of three months, it shall be the duty of any magistrate of the said beat, on information of any of the inhabitants thereof, to issue patrol warrants, in the same way and manner as company officers are required to do, to execute the patrol duties of the said beat, and the said magistrate shall cause returns to be made of all defaulters, to the next regimental court martial, to be dealt with according to law. Act 1849—123.

The power and duty of regulating and superintending the patrol within the several incorporated towns and villages of this State, be, and the same are hereby vested in and devolved upon the municipal police of the said towns and villages, who are hereby vested with full powers to make all such ordinances, relative to the time and manner of performing patrol duty, within the limits of the said towns and villages, necessary to preserve the peace, good order and safety of the same. Act 1839, 61—sec. 18.

3d. *Their Powers, &c. (See Assemblies and Arms)*

It shall be the duty of the commander of every patrol, at least as often as once a fortnight, to call out the patrol under his command, and to take up all slaves who may be found without the limits of their owner's plantation, under suspicious circumstances, or at a suspicious distance therefrom, and to correct all such slaves by a moderate whipping with a switch or cowskin, not exceeding twenty lashes, unless the said slave shall have a ticket or letter to shew the reasonableness of his or her absence, or shall have some white person in company to give an account of the business of such slave or slaves; and if any white man shall beat or abuse any slave, quietly and peaceably being in his master's plantation, or found any where without the same with a lawful ticket, he shall forfeit the sum of fifty dollars, to be recovered by the owner, and to his use, by action of debt, besides being liable to the owner in an action of trespass for damages. Act 1839, 58, sec. 5.

The said patrols, in their respective divisions, shall have power, and they are hereby authorized and required, to enter into any disorderly house, vessel or boat, suspected of harboring, trafficking, or dealing with negroes, whether the same be occupied by white persons,

Magistrate to
issue in
certain cases.

Regulation
of patrol
duty in
towns and
villages,
vested in
their principal
police.

Commanders
of patrol to
call out their
men, &c.

Power to
enter disorderly
houses,
vessels,
boats, &c.

free negroes, mulattoes, mustizoes, or slaves, and to apprehend and correct all slaves found there, by whipping, as herein before directed; and the said patrols are moreover authorized and required to give information to a magistrate, of such white persons, free negroes, mulattoes, or mustizoes, as may be found in such house, vessel or boat, and to detain in their possession such produce or articles for trafficking, as may be found in such house, vessel or boat, if such detention be authorized by any three freeholders, or by any justice of the peace, until the same shall be recovered, according to law. And it shall be the duty of the owner of each vessel or boat, navigating the public rivers or canals of this State, to keep and produce to the magistrates or patrols, who may demand it, a list of all the negroes, composing the crew of said vessel, with their owner's names, and a description of their persons.—Ibid, sec. 6.

Captains of
patrol to
make returns
on oath.

Each captain of patrol, shall make a return, on oath, of the performance of the duties of his office, as a commander of such patrol, to the captain or officer commanding the beat company, at the regular time required by this Act, under the penalty of a fine of twenty dollars.—Ibid, sec. 10.

4th. *Liabilities.*

Commanders
to keep their
men in order,
&c.

The commander of every patrol, shall have power to keep the men under his command, in good order and demeanor, during their term of service; and in case any patrol man shall misbehave himself, or neglect or disobey the orders of his commander, he shall be subject to a fine of not less than two dollars, nor more than twenty, to be imposed by a court martial. Act 1839. 59, sec. 7.

Commanders
to be
returned
for disorderly
conduct.

If any captain of a patrol, shall act disorderly while on duty, so as to defeat the orderly performance or execution of the patrol laws, agreeable to the true intent and meaning thereof, he shall be liable to be returned by either of the members of his patrol, or other person competent to give evidence, to the commanding officer of the beat, who shall return him to a court martial for trial; and upon sufficient evidence being given of the charge, such captain of the patrol shall be subject to a fine of not less than five, nor more than fifty dollars.—Ibid, sec. 8.

Exemption
from toll.

Exemption from the payment of toll at every bridge, ferry and turnpike road, now and hereafter chartered, shall be, and is hereby granted to every person travelling, in the performance of patrol duty. Ibid, sec. 16.

The captain or commanding officer of a company, the leader of a patrol, and any person declared liable by this Act, to perform patrol duty, who shall neglect or refuse to perform the duty required by this Act, shall be summoned to and tried by the same courts martial, ordered for the trial of officers, non-commissioned officers, and privates of the militia; and execution shall be issued, and collection made, in the same manner as for military fines. Ibid, sec. 17.

If any person or persons, shall commence an action against any patrol, for any trespass by him committed, in carrying into execution the provisions of this Act, and at the trial thereof shall fail to recover any damage, he, or they, shall be liable and adjudged to pay, to the party so sued, treble costs. Ibid, sec. 19.

P E A C E.

[See SURETY FOR.]

PERJURY AND SUBORNATION.

- 1st. WHAT IS.
- 2d. EVIDENCE OF.
- 3d. PUNISHMENT.

Perjury, by the common law, appears to be a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not. 2d Russell, 517.

But by Act of 1833, 6th S. L., 485, any person who shall wilfully and knowingly swear falsely, in taking any oath, now, or at any time hereafter, required by law, and administered by any person directed or permitted to administer such oath, shall be deemed guilty of perjury.

Subornation of perjury, by the common law, is an offence in procuring a man to take a false oath amounting to perjury, who actually takes such oath. But it seems clear that if the person, incited to take

such an oath, do not actually take it, the person by whom he was so incited is not guilty of subornation or perjury; yet it is certain that he is liable to be punished, not only by fine, but also by infamous corporal punishment. 2d Russell, 517.

A man may be indicted for perjury in swearing that he believes a fact to be true.

It has been said that no oath will amount to perjury, unless it be sworn absolutely and directly, and, therefore, that he who swears a thing according as he thinks, remembers, or believes, cannot, in respect to such an oath, be found guilty of perjury. But De Grey, Ld. C. J., appears to have laid down a different doctrine. And Lord Mansfield, C. J., is stated to have said, "it is certainly true that a man may be indicted for perjury in swearing that he believes a fact to be true which he must know to be false." It is further said that, upon this question being agitated in the Court of Common Pleas, all the judges were unanimous that belief was to be considered as an absolute term, and that an indictment might be supported upon such a statement. 2 Russell, 518.

2d. Evidence of.

Two witnesses necessary.

In cases of perjury two witnesses are required, as well to prove the facts sworn to, as the falseness of the oath. *State vs. Howard*, 4th M'Cord, 159. But one witness is sufficient if he be corroborated by material circumstances.

Party prejudiced, competent.

The party prejudiced by the perjury is a competent witness. So also is a witness who has before sworn to the same fact, or is himself indicted for perjury.

3d. Punishment.

At common law.

The punishment of perjury and subornation at common law, is fine, imprisonment, and never more to be capable of bearing testimony. But the Statute 5th Eliz., ch. 9, (2d S. L., 348,) inflicts the penalty of perpetual infamy, and a fine of £40 on the suborner, and in default of payment, imprisonment for six months, and to stand with both ears nailed to the pillory. And for perjury itself, the punishment by the said statute is, imprisonment for six months, perpetual infamy, and a fine of £20, or to have both ears nailed to the pillory.

By Statute 5th Eliz. c. 9.

Persons sworn may be committed to the house of correction.

Besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the Court or judge before whom any person shall be convicted of wilful and corrupt perjury or subornation of perjury, according to the laws now in being, to order and send such person to the house of correction, there to be kept to hard labor for any term or time, not exceeding the term of seven years.

3d S. L., 470, sec. 4. To which is added by Act of 1833, 6th S. L., 495, whipping on the bare back, within the discretion of the Court.

POWER OF ATTORNEY.

[See ATTORNEY.]

R A P E .

1st. OF RAPE.

2d. CARNAL KNOWLEDGE OF FEMALE CHILDREN.

3d. ASSAULT, WITH INTENT TO COMMIT A RAPE.

1st. Of Rape.

Rape has been defined to be the having unlawful and carnal know-^{What is} ledge of a woman, by force, and against her will. 1st Russell, 556.

It is the essential character of this crime, that it must be against the will of the female on whom it is committed. And if a woman be beguiled into her consent by any artful means, it will not be a rape, and therefore having carnal knowledge of a married woman, under circumstances which induced her to suppose it was her husband, was held by a majority of judges not to be a rape. However, the crime is not mitigated by shewing that the woman yielded, at length, to violence, if her consent was obtained by duress or threats of murder; nor will any subsequent acquiescence on her part do away the guilt of the ravisher; and it is no defence to shew that the prosecutrix was taken at first with her own consent, if she was afterwards forced against her will. The circumstance of the woman's generally submitting to illicit intercourse, will not diminish the guilt of her ravisher, because she is still under the protection of the law, and must not be deprived of the opportunity of repentance. Formerly it was said to be no rape for a man to have forcible knowledge of his own concubine; but the law now presumes the possibility of her return to virtue. A man cannot, indeed, be himself guilty of a rape on his own wife, for the matrimonial consent

^{Must be against the will.}

cannot be retracted; but he may be criminal in aiding and abetting others in such a design. 4th Blackstone, 213, (note.)

Of aiders
and accessories.

All who are present, aiding and assisting a man to commit a rape, are principal offenders in the second degree, whether they be men or women; and they are also ousted of clergy. And there may be accessaries before and after in this offence; for though it may be made felony by a statute, which speaks only of those who commit the offence, yet accessaries, before and after, are consequentially included: but such accessaries are not subject to capital punishment. 1st Russell, 557.

Evidence.

The party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance; if the witness be of good fame; if she presently discovered the offence, and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place, where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive presumption, that her testimony is false or feigned. 4th Blackstone, 214.

Punishment.

By the Statute 18 Elizabeth, ch. 7th, the punishment of rape is, death without benefit of clergy. 2d S. L., 498.

2d. Carnal Knowledge of Female Children.

To know a
woman carnally,
under the age of
ten years,
shall be
felony.

If any person shall unlawfully and carnally know and abuse any woman child under the age of ten years, every such unlawful and carnal knowledge shall be felony, and the offender thereof being duly convicted, shall suffer as a felon without allowance of clergy. 2d S. L., 499, sec. 4th.

3d. Assault, with intent to commit a Rape.

By a white
person.

Where there is no reason to expect that the facts and circumstances of the case, when given in evidence, will establish that the crime of rape has been completed, the proper course will be, to prefer an indictment at common law, for an assault with intent to ravish; which offence, though only a misdemeanor, yet is one of a very aggravated

nature, and has, in many instances, been visited with exemplary punishment. 1st Russell, 563.

Any slave or free person of color, who shall commit an assault and battery on a white woman, with intent to commit a rape, or being thereof convicted, shall suffer death, without the benefit of clergy. By a slave, or free person of color.
Act 1843, 258.

RECOGNIZANCE.

A recognizance is an obligation of record, which one enters into before some court of record, or magistrate duly authorized, with condition to do some particular act, as to appear at the assizes, to keep the peace, or the like,—3d Tom., 297.

1st. REQUISITES OF A RECOGNIZANCE.

2d. HOW ESTREATED.

3d. OF DISCHARGE OF.

4th. GENERAL FORM OF.

1st. Requisites of, &c.

In all recognizances, acknowledged since the twenty-sixth day of March, one thousand seven hundred and eighty-four, or which shall hereafter be acknowledged, by any person, for keeping the peace, or good behavior, or for appearing as a party, surety or witness, at any Court of criminal jurisdiction within this State, the sum or sums of money in which any such person shall be bound shall be made, and payable, to the State, in aid of the revenue thereof; and every such recognizance shall be good and effectual in law, provided it be signed by every party thereto, and also acknowledged in the presence of a judge or justice of peace, who shall certify such acknowledgment, otherwise such recognizance shall be void. 5th S. L., 13.

Though a recognizance portends to be a sealed instrument, yet a seal is not absolutely necessary to give it validity. a Seal not necessary. State vs. Foot, et al., 2d M. C. R., 123.

It must contain the name, place of abode, and trade or calling, both of principal and sureties, and the sums in which they are bound. Names, etc. of parties. And it is most commonly subject to a condition, which is either endorsed or under-written, or contained within the body of it; upon the performance of which the recognizance shall be void. Grimke, 367.

2d. *How Estreated.*

Sci. fa., to
issue.

Whenever any such recognizance shall become forfeited by non-compliance with the condition thereof, the attorney-general, or other person acting for him, shall, without delay, issue a *scire facias*, to summon every party bound in such forfeited recognizance, to be and appear at the next ensuing court of sessions, to shew cause, if any he hath, why judgement should not be confirmed against him; and if any person, so bound, fail to appear, or appearing, shall not give such reason for not performing the condition of such recognizance as the Court shall deem sufficient, then the judgement on such recognizance shall be confirmed. 5th S. L., 13, sec. 1.

If adjudged
forfeited,
fi. fa. to
issue.

In every case where any such recognizance shall be adjudged so forfeited, or where any fine shall be imposed by, or recovered, for the use of the State, in any district or county court, or before a justice, if the party incurring such fine or forfeiture, shall fail to pay down the same, with the cost of prosecution, then a writ, in nature of a *ieri facias*, shall issue, by virtue of which, the sheriff or his deputy shall sell (in the same manner as property is sold, under execution, in civil cases,) so much of such offender's estate, real or personal, as may be necessary to satisfy the fine or forfeiture, and also the costs of prosecution, and also the reasonable charges of taking, keeping and selling such property, returning the overplus, if any, to the offender, together with a bill of the fine or forfeiture, with costs and charges, if he require it; but the sheriff shall sell every other part of the personal estate before he shall sell any negroes.—Ibid.

On return of
nulla bona,
ca. sa. to
issue.

And if the sheriff or his deputy return on oath that such offender refuseth to pay, or hath not any property, or not sufficient whereon to levy, then a writ of *capias ad satisfaciendum* shall issue, whereby he shall be committed to the common jail, until the forfeiture, costs and charges shall be satisfied; entitled, however to the privilege of insolvent debtors.—Ibid.

Court may
remit.

If any person shall forfeit a recognizance from ignorance or unavoidable impediment, and not from wilful default, the court of sessions may, on affidavit, stating the excuse or cause thereof, remit the whole or any part of the forfeiture, as may be deemed reasonable. 5th S. L., page 14th. But this discretion does not extend to cases of wilful default. *State vs. Heyward*; Mss., Dec., 1819.

3d. *Of Discharge of.*

The defendant entered into a recognizance, "personally to appear before the next court of sessions," to answer to a bill of indictment for

t on one Cunningham; at the subsequent January term he
ted, and the bill was traversed by counsel: at a subsequent
attorney general entered a *nol. pros.* on the indictment,
out another. A motion was made on the part of the bail
ge him from his liability, on the ground that the defendant
rmed the condition of the recognizance; the motion was
y the presiding judge, but on a motion to reverse the order, the
ld, that the undertaking of the bail was, that his principal
ersonally appear and abide the final termination of the case;
averse of the case, by an attorney, was no more a perform-
ie undertaking than an appearance or plea would be in a
n: t hat the entry of a *nol. pros.*, by the attorney general,
final termination of the case, as he might, in his discretion,
another bill, which the defendant would be still bound by his
nce to answer, and reversed the order of the circuit judge.
Haskett; Riley's cases, 97.

case of the State vs. Le Cerf, 1st Bailey, 410, it was held,
render to a deputy sheriff or constable of the principal, bound
gnizance by the surety, did not discharge the recognizance.
nder, in such a case, must be to some officer who may com-
rincipal, or take another recognizance. This rule recognizes
the practice of magistrates to admit of surrender to them-
id taking other surety, or committing the principal.

4th. General Form of.

OF SOUTH-CAROLINA.

remembered, that on the day of in the year of our
e thousand eight hundred and , personally appeared
id C. D., before me, Magistrate, in and for the said
ho acknowledged themselves indebted to the State of South
, that is to say, the said A. B. in the sum of dollars; and
C. D. in the sum of dollars, like money, to be levied of
arate lands and tenements, goods and chattels, respectively,
r the use of the said State, if the above mentioned A. B. shall
e performing the condition underwritten.

condition of this recognizance is such, that if the said
ersonally appear before the Court of General Sessions for the
of in the State aforesaid, to be holden at the usual place
ature, on the Monday in , then and there to
and to do and receive what shall be enjoined
Court, and not to depart the Court without license: and in the

LAW OF MAGISTRATES.

mean time, that the said do keep the peace of the State,
and be of good behavior towards all the citizens thereof, and espe-
cially towards the said ; then this recognizance to be null
and void, or else to remain in full force and virtue.

Taken and acknowledged, the day and }
year above written, before me, }

E. F.

Magistrate.

A. B. **[L. S.]**

C. D. **[L. 8.]**

RENT.

[See LANDLORD AND TENANT.]

R E P L E V I N .

[See DISTRESS.]

RESCUE,

Is the knowingly and forcibly freeing another from imprisonment or arrest.

**Of the pro-
ceedings in
cases of
rescue.**

The sheriff's return of a rescue, is not of itself sufficient to put the party to answer for it as a felony, without indictment or presentment. And it is the better opinion, that he who rescues one, imprisoned for felony, cannot be arraigned for such offence as a felony, until the principal offender be first attainted; unless the person rescued were imprisoned for high treason, in which case, the rescuer may be immediately arraigned; all being principals in high treason. But it is said that he may be immediately proceeded against for a misprision only, if the king please: and if the principal be discharged, or found guilty only of an offence, not capital, such as petit larceny, &c., though the rescuer cannot be charged with felony, yet he may be fined and imprisoned for a misdemeanor. 1st Russell, 384.

The rescue of one apprehended for treason is itself treason : and ^{Of the punishment for a rescue.} the party rescuing one in custody for felony, or suspicion of felony, will, as we have seen, be guilty of a crime of the same kind; though not in all cases punishable in the same degree; for the rescuer will be entitled to his clergy, though the crime of the prisoner rescued were not within clergy.—Ib.

The rescue of a prisoner, in any of the superior Courts, committed ^{Or aiding a prisoner to escape.} by the justices, is a great misprision; for which the party, and the prisoner, (if assenting), will be liable to be punished by imprisonment for life, though no stroke or blow were given. Ib., 385.

RESISTING AN OFFICER.

The obstructing the execution of lawful process is an offence ^{A party opposing an arrest upon criminal process, becomes participant criminals.} against public justice of a very high and presumptuous nature; and more particularly so when the obstruction is of an arrest upon criminal process. So that it has been holden that the party opposing an arrest upon criminal process becomes thereby *particeps criminis*, that is, an accessory in felony, and a principal in high treason. 1st Russell, 360.

But in ordinary cases where the offence committed is less than felony, the obstruction of officers in the apprehension of the party, will be only a misdemeanor, punishable by fine and imprisonment. Ib. 361.

It should be observed, that a party will not be guilty of this offence ^{The arrest must be lawful to make a party guilty of an obstruction.} of obstructing an officer, or the process which such officer may be about to execute, unless the arrest is lawful. And in an indictment for this offence, it must appear that the arrest was made by proper authority. Thus, where an indictment for an assault, false imprisonment, and rescue, stated that the judges of the Court of record of the town and county, &c., of P., issued their writ, directed to T. B., one of the serjeants at mace of the said town and county, to arrest W., by virtue of which T. B. was proceeding to arrest W. within the jurisdiction of the said Court, but that the defendant assaulted T. B. in the due execution of his office, and prevented the arrest; the Court held that it was bad, as it did not appear that T. B. was an officer of the Court; a serjeant at mace *ex vi termini*, meaning no more than a person who carries a mace for some one or other. And the Court also held that there could not be judgement, after a general verdict on such a count, as for a common assault and false imprisonment; because the jury

must be taken to have found that the assault and imprisonment were for the cause therein stated; and that cause appeared to have been the attempt by the officer to make an illegal arrest. Lord Ellenborough, C. J., said, "process ought always to be directed to a proper known officer; otherwise, if it may be directed to any stranger, it might be resisted for want of knowledge that the party is an officer of the Court. Then, taking the whole count together, the jury in effect find that there was an assault and imprisonment, but committed under circumstances which justified the defendant. For if a man without authority attempt to arrest another illegally, it is a breach of the peace; and any other person may lawfully interfere to prevent it, doing no more than is necessary for that purpose; and nothing further appears in this case to have been done." *Ib.*, 362.

But where the arrest is lawful, though the execution of it be attended with an affray, even a peace officer must not interpose and obstruct the officer endeavoring to effect it.

But where the process is regular, and executed by the proper officer, it will not be competent even for a peace officer to obstruct him, on the ground that the execution of it is attended with an affray and disturbance of the peace; for it is an established principle that if one, having a sufficient authority, issue a lawful command, it is not in the power of any other, having an equal authority in the same respect, to issue a contrary command; as that would be to legalize confusion and disorder. The following case upon an indictment for an assault and rescue, proceeded upon this principle. Some sheriff's officers having apprehended a man by virtue of a writ against him, a mob collected, and endeavored by violence to rescue the prisoner. In the course of the scuffle, which was at ten o'clock at night, one of the bailiffs, having been violently assaulted, struck one of the assailants, a woman, and it was thought for some time that he had killed her; whereupon, and before her recovery was ascertained, the constable was sent for, and charged with the custody of the bailiff who had struck the woman. The bailiffs, on the other hand, gave the constable notice of their authority, and represented the violence which had been previously offered to them; notwithstanding which, the constable proceeded to take them into custody upon the charge of murder, and at first offered to take care also of their prisoner; but their prisoner was soon rescued from them by the surrounding mob. The next morning, the woman having recovered, the bailiffs were released by the constable. Upon these facts, Heath, J., was clearly of opinion, that the constable and his assistants were guilty of the assault and rescue, and directed the jury accordingly.—*Ib.*

RESTITUTION OF STOLEN GOODS.

1st. RECAPTION OR SUIT.

2d. RESTITUTION BY THE COURT.

1st. Recaption or Suit.

A party whose goods have been stolen, may peaceably retake them wherever he happens to find them, unless a new property has been acquired therein. Or if the felon be convicted and pardoned, or be owed his clergy, the party robbed may bring trover against him his goods, and recover satisfaction in damages. But such action is not before prosecution; for so felonies would be made up and alled; and also recaption is unlawful, if it be done with intention to other or compound the larceny. 4th Blackstone, 364.

Owner may retake.

Or bring an action.

2d. Restitution by the Court.

On a conviction of larceny in particular, the prosecutor shall have restitution of his goods, by virtue of the Statute 21 Hen. VIII., ch.

On conviction of thief.

For by the common law there was no restitution of goods upon indictment, because it is at the suit of the king only; and therefore a party was enforced to bring an appeal of robbery, in order to recover his goods again. But, it being considered that the party prosecuting the offender by indictment, deserves to the full as much encouragement as he who prosecutes by appeal, this statute was made, which enacts, that if any person be convicted of larceny, by evidence of the party robbed, he shall have full restitution of his money, goods, and chattels; or the value of them, out of the offender's goods, if he has any, by a writ to be granted by the justices. And the construction of this Act having been in great measure conformable to the law of appeals, it has therefore in practice superseded the writ of appeals of larceny. For instance; as formerly upon appeals, so now upon indictments of larceny, this writ of restitution shall reach the goods so stolen, notwithstanding the property of them is endeavored to be altered by sale in market overt. And though this may seem somewhat hard upon the buyer, yet the rule of law is that *poliatus debet, ante omnia, restitui*;" especially when he has used the diligence in his power to convict the felon. And, since the law is reduced to this hard necessity, that either the owner or the buyer must suffer, the law prefers the right of the owner, who has done a meritorious act by pursuing a felon to condign punishment, to the right of the buyer, whose merit is only negative, that he has been

Restitution to be made.

Notwithstanding sale.

guilty of no unfair transaction. And it is now usual for the Court, upon the conviction of a felon, to order (without any writ) immediate restitution of such goods, as are brought into Court, to be made to the several prosecutors. 4th Blackstone, 363.

Not if party
was negligent.

Yet if it shall appear to the Court, that the party has been guilty of gross neglect in prosecuting, it seemeth that in such case he shall not be entitled to restitution. Grimke, 372.

RETAILERS AND TAVERN KEEPERS.

1st. OF THE LICENSE.

2d. PENALTY FOR RETAILING WITHOUT LICENSE.

3d. OTHER PENALTIES.

1st. Of the License.

The sole and exclusive power of granting licenses to retailers of spirituous liquors, tavern keepers and keepers of billiard tables, be, and the same is hereby vested in the commissioners of roads, or a majority of them, in their respective districts, parishes or divisions, throughout the State, except in such cases where the legislature has delegated or may hereafter delegate the same power to other persons; and the commissioners of roads, or a majority of them, in their respective districts, parishes or divisions, shall, at any stated meeting, and at no other time, hear all applications for licenses to keep taverns, and retail spirituous liquors, and keep billiard table or tables, and shall reject or grant such license or licenses for one year, as to them shall seem proper; provided, that it shall and may be lawful for the clerk of any board of commissioners of roads, in their respective district, parish or division, to grant a permit or license, under his hand and seal, to any person or persons, to keep a tavern or retail spirituous liquors, during the recess of the sittings of their respective boards; which permit or license shall remain in force only until the next meeting of said board respectively: and provided, also, that the person or persons applying for the said permit or license, shall produce to the clerk of the board the certificate of the commissioner of roads residing in the division where the applicant intends to keep a tavern or retail spirituous liquors, certifying that the person or persons applying, is or are proper persons to be permitted to keep a tavern or retail spirituous liquors; and shall give bond and security in the

To be granted by commissioners of the roads.

Or by clerk during recess of the board.

enial sum of four hundred dollars, payable to the said board of commissioners for the parish, district or division, where the application shall be made; conditioned that he will, at the next regular meeting of the board of commissioners for the parish, district or division, where the application shall be made, make application to the said board for a license for one year, to take date from the regular meeting of the board of commissioners; and shall also, at the time of such application, pay to the said clerk, a sum that shall be equal to the rates of a license for the year, for the time the said permit or license shall be in force. 9th S. L., 564, sec. 23.

It shall not be lawful for any corporate body, or the commissioners of the roads in their respective limits, to grant any license to retail spirituous liquors, unless the applicant for such license shall first enter into recognizance, with two substantial freeholders, who are residents of the district, as sureties, in the penalty of one thousand dollars, and conditioned for the observance of all laws in force in regard to retailing spirituous liquors; and the recognizance so given shall be liable to be estreated for all fines imposed by the Court, for any violation of said laws, of which the party shall be convicted by indictment. 6th S. L., 528, sec. 1st.

The sum of fifty dollars shall be paid for a license to retail spirituous liquors, in lieu of the sum heretofore required by law. 6th S. L., 528, sec. 3.

2d. Penalty for Retailing without License.

If any person or persons within this State, not duly licensed in manner above directed, shall at any time presume to keep a billiard table, tavern, inn, ordinary, punch or ale house, or retail any wine, brandy, rum, gin, beer, cider, punch, or any spirituous liquor or strong drink whatsoever, in any quantity less than three gallons, he, she, or they shall forfeit the sum of fifty pounds sterling, for every such offence, to be recovered by bill, plaint or information, in any Court of record in this State, by any person who will inform and sue for the same; one half thereof to be paid to the said informer, and the other half to the public treasury, for the use of this State; provided always, that nothing herein contained shall extend, or be construed to extend, to subject any person now keeping a billiard table, or retailing spirituous liquors, under a license granted by virtue of any former law of this State, to the above mentioned penalty, during the term for which such license was granted. 4th S. L., 576, sec. 3.

By Act 1825, 9th S. L., 564, the penalty, in such case, is changed

Fine not to extend to those selling their own manufacture.

to one hundred dollars: *Provided*, however, that nothing herein contained shall prevent any person from selling or retailing spirituous liquors, not less than one quart, distilled on his own plantation, of the growth and produce of this State. and to be carried away from the same.

Imprisonment.

In all cases of conviction for retailing spirituous liquors without a license, it shall be in the discretion of the judge either to impose the fine, now provided by law, or to sentence the offender to imprisonment for a term not exceeding six months. Act of 1842, p. 226.

Authorized by another, no defence.

No individual can authorize another to violate a public law; and, therefore, where the defendant was indicted for retailing without a license, it is no defence that he was acting as the agent of another. *State vs. Mathis*, 1st Hill, 37.

3d. Other Penalties.

To prohibit the sale of spirituous liquors, or other articles, at or near the places assigned for divine worship.

No person or persons shall hereafter retail, sell, or otherwise dispose of, any spirituous or other intoxicating liquors, within one mile of any church, meeting-house, or other place, set apart for the worship of Almighty God, on the day or days of worship, under the penalty of fifty dollars, to be recovered by action of debt or indictment, in any Court having jurisdiction thereof, the money to be applied to the use of the poor of the parish or district in which such act shall be committed. *Provided*, nevertheless, that this Act shall not be considered to interfere with or affect the rights of persons who may reside within one mile of such place of worship, and who may be licensed to retail such liquors according to law, so as to prevent their retailing at their own houses. 5th S. L., 599, sec. 1st.

A camp meeting, or temporary encampment of a denomination of Christians, for the purpose of religious exercises, is "a place set apart for the worship of Almighty God," within the intent and meaning of the Act of 1809: and a defendant, convicted of retailing spirituous liquors within one mile thereof, on a day appropriated to religious exercises, is subject to the penalties imposed by that Act. Nor does it remove, or lessen the offence, that the retailing occurred on a navigable river, or other public highway. *State vs. Hall*, 2 Bailey, 151.

In an indictment under the Act of 1809, for retailing spirituous liquors, within one mile of a place set apart for the worship of Almighty God, it is not necessary to negative the defendant's being within the exception, contained in the proviso of the Act, of the rights of persons having a license to retail, and residing at the place of retailing: the

exception is matter of defence, and it is for the defendant to shew that he is within it.—Ibid.

Every vender or retailer of spirituous liquors, who shall clandestinely, or behind, or within any screen, booth, or other place of concealment, exchange, give, deliver, sell or retail any spirituous liquors, shall, upon conviction, be fined in a sum not less than fifty dollars, nor more than two hundred dollars, according to the discretion of the presiding judge. 6th S. L., 528, sec. 2d.

Liquors to be vended openly.

The books of accounts of tavern-keepers, shop-keepers, or retailers of spirituous liquors, shall not be admitted, allowed or received as evidence, in any Court having a right to try the same, of any debt contracted, or monies due, for spirituous liquors sold in less quantity than a quart. 6th S. L., 318, sec. 1st.

To prevent the recovery of debts contracted for ardent spirits, sold under a certain measure.

RIOTS AND ROUTS.

A riot is described to be a tumultuous disturbance of the peace, by three persons or more, assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same, in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful. 1st Russell, 247.

A riot,

A rout is a disturbance of the peace, by persons assembling together, with intention to do a thing, which, if executed, will make them riotous, and actually making a motion towards the execution of their purpose. It agrees with a riot in every particular, except only, that it may be a complete offence without the execution of the intended enterprise.

A rout.

1st. OF THE VIOLENCE.

2d. THE PREVIOUS CONCERT.

3d. OF THE PERSONS CONCERNED.

4th. HOW SUPPRESSED AND PUNISHED.

1st. Of the Violence.

It seems to be clearly agreed, that in every riot there must be some such circumstances, either of actual force or violence, or at least an apparent tendency thereto, as are naturally apt to strike a terror into the people; as the show of armor, threatening speeches, or

As to the degree of violence or terror.

turbulent gestures; for every such offence must be laid to be done in *terrorum populi*. But it is not necessary, in order to constitute this crime, that personal violence should have been committed. 1st Russ., 248.

The legality or illegality of the act intended to be done, not material if there be violence and tumult.

But if there be violence and tumult, it has been generally holden not to make any difference whether the act intended to be done by the persons assembled, be of itself lawful or unlawful; from whence it follows, that if three or more persons assist a man to make a forcible entry into lands, to which one of them has a good right of entry; or if the like number, in a violent and tumultuous manner, join together in removing a nuisance or other thing, which may be lawfully done in a peaceable manner, they are as properly rioters as if the act intended to be done by them were ever so unlawful. And if in removing a nuisance, the persons assembled use any threatening words, (such as, they will do it though they die for it, or the like,) or in any other way behave in apparent disturbance of the peace, it seems to be a riot. 1 Russell, 249.

Where three or more persons assemble together armed, with an intent mutually to assist one another, in an enterprise of a private nature, and, afterwards execute the same in a threatening manner, it is a riot, whether the act done be lawful or not. *State vs. Brooks*, 1st Hill, 361.

2d. Of the Previous Concert.

How far the violence and tumult must be premeditated.

But the violence and tumult must, in some degree, be premeditated. For, if a number of persons, being met together at a fair, market, or any other lawful or innocent occasion, happen on a sudden quarrel to fall together by the ears, it seems to be agreed that they are not guilty of a riot, but only of a sudden affray, of which none are guilty but those who actually engage in it, because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly, without any previous intention. But if, there be any predetermined purpose of acting with violence and tumult, the conduct of the parties may be deemed riotous. As where it was held, that although the audience in a public theatre had a right to express the feelings excited at the moment by the performance, and in this manner to applaud or to hiss any piece which is represented, or any performer who exhibits himself on the stage; yet if a number of persons, having come to the theatre with a predetermined purpose of interrupting the performance, for this purpose make a great noise and disturbance, so as to render the actors entirely inaudible, though

without offering personal violence to any individual, or doing any injury to the house, they are guilty of a riot. 1st Russell, 250.

If persons, who have assembled for a lawful purpose, do afterwards associate together to commit an unlawful act, such association will be considered an assembling together for that purpose; so three or more patrolling may commit a riot. *State vs. Cole, et al*; 2d M'Cord, 117.

3d. *Of the persons concerned.*

If any person, seeing others actually engaged in a riot, joins himself to them and assists them therein, he is as much a rioter as if he had at first assembled with them for the same purpose, inasmuch as he has no pretence that he came innocently into the company, but appears to have joined himself to them with an intention of seconding them in the execution of their unlawful enterprise; and it would be endless, as well as superfluous, to examine whether every particular person engaged in a riot were in truth one of the first assembly, or actually had a previous knowledge of the design. And the law is, that if any person encourages, or promotes, or takes part in riots, whether by words, signs or gestures, or by wearing the badge or ensign of the rioters, he is himself to be considered a rioter; for in this case all are principals. It has been ruled, however, that if three or more, being lawfully assembled, quarrel, and the party fall on one of their own company, this is no riot; but that if it be on a stranger, the very moment the quarrel begins, they begin to be an unlawful assembly, and their concurrence is evidence of an evil intention in them that concur, so that it is a riot in them that act, and in no more. The inciting persons to assemble in a riotous manner, appears also to have been considered as an indictable offence. 1st Russell, 250.

Any person taking part in a riot, is a rioter; all are principals.

A negro servant (slave) with two white persons, may commit a riot. *State vs. Calder*; 2d M'Cord, 462.

Where persons unknown, with the person indicted, were necessary to constitute the offence of a riot, they should be stated to be unknown, and so proved: if known, it should have been stated who they were.—*Ib.*

Where it incidentally came out on the examination, that the domestics (slaves) of one of the persons indicted for a riot, were present, and by his order took off some furniture, the court held, the evidence was not such as would constitute them parties to the combination necessary to complete the offence of a riot.—*Ib.*

4th. *How suppressed.*

The common law, and also several ancient statutes, authorize

Suppression
of riots.
By common
law.

proceedings for the restraining and suppression of riots. By the common law, the sheriff, under-sheriff, constable, or any other peace officer, may, and ought to do, all that in them lies, towards the suppression of a riot, and may command all other persons to assist them: and by the common law also any private person may lawfully endeavor to appease such disturbances, by staying the persons engaged from executing their purpose, and also by stopping others coming to join them. It has been holden also, that private persons may arm themselves in order to suppress a riot; from whence it seems clearly to follow that they may also make use of arms in suppressing it, if there be a necessity. However, it may be very hazardous for private persons to proceed to these extremities; and such violent methods seem only proper against such riots as savor of rebellion. 1st Russell, 266.

Punishment.

The punishment for offences of the nature of riots, routs, or unlawful assemblies, at common law, is fine and imprisonment, in proportion to the circumstances of the offence: and formerly, in cases of great enormity, it appears, that the offenders were sometimes punished with the pillory. 1st Russell, 269.

ROBBERY.

[See LARCENY.]

RUNAWAYS.

[See HARBORING.]

Persons
having in
their posses-
sion, or
taking up,
runaway
slaves, to
send them
to the jails of
the districts
where they
may be
apprehended.

Every person or persons, having in custody, or taking up one or more runaway slaves, shall cause the same to be conveyed and delivered to the jailor of any district in which such slave shall be apprehended, within five days after having such slave in custody, under the penalty of twenty shillings for each day he or they shall neglect to carry such slave to the jailor, to be recovered by the owner, before a magistrate, or any court of record, as the case may require; and the said jailor shall, on receiving such slave or slaves, confine and be

answerable for the same, and give a receipt thereof, and also give his note of hand to the person so delivering the same, for the amount of the party's trouble and expenses, allowing four pence per mile, and a half dollar per day, allowing twenty-five miles per day going, only, and the sum of ten shillings for taking up every such slave, if a runaway; which note shall be made payable to the bearer, and reimbursed to the jailor, immediately, out of the amount sales of every such negro, or when his owner shall take him out of jail, which shall not be before such owner shall pay such and other lawful charges for confining and maintaining of such slave; provided, that where any person hath or shall take up any slave, he shall cause him to be conveyed to a neighboring justice, who may examine the party on oath, touching the distance and time in which he hath necessarily travelled, and in which he shall go with such slave the nearest way to the district jail, and thereof shall give a certificate, on a just estimate of such time and distance; without which certificate the jailor shall not be obliged to give his note; but he shall, notwithstanding, take every such slave into confinement. 7th S. L., 430, sec. 1st.

If the owner or owners of such property as is the subject of the above Act, shall make oath, and prove his, her, or their property, to the satisfaction of any one of the judges of this State, or any one justice of the quorum, such owner or owners, upon obtaining and producing a certificate of such proof under the hand of any one of the judges, or any one justice of the quorum, (which the judges or justices are hereby required to give) shall be entitled to take possession of such property, without personally appearing before the magistrate before whom the information description of such property was taken, and by whom such property was advertized. P. L., 333, sec. 6th.

Upon receiving any runaway slave into custody, it shall be the duty of the sheriff or jailor to publish the name, age, and other particular description of such slave, and the name of the person said to be the owner, in some public gazette, once a week, for three months, and also to give specific notice of the confinement of such slave to the owner, if his name and address can be ascertained; he shall continue the custody of such slave for twelve months, if no sooner regained by the owner; and if at the end of such term, no owner shall establish his claim to the same, in manner as now directed by law, the sheriff shall, after advertising the same for one month, as sheriff's sales are advertised, proceed to sell such runaway slave for cash, and after deducting the amount of charges, shall pay over the balance of the proceeds to the Commissioners of Public Buildings, to belong abso-

Owners
proving their
property
before one of
the judges.

Proceedings
respecting
runaway
slaves.

lutely to such Board, if no claim within two years be made by the owner of such slave; and every sheriff or jailor, who shall commit default herein, shall be liable to answer in damages to the party injured, in a civil action on the case, besides being liable to punishment, on conviction, by indictment, as for a high misdemeanor. Any title executed by the sheriff, for any runaway slave, so sold as aforesaid, shall be good and valid to the purchaser. Act of 1839, 36, sec. 58.

SEAMEN.

[See HARBORING.]

1st. HIS DEBTS AND GOODS.

2d. OF DESERTERS.

1st. *Debts, &c.*

It shall not be lawful for any keeper of a public or lodging house for seamen, at any time to recover from any seaman any debt exceeding one dollar; and no debt exceeding said sum, incurred by any seaman to any other person, shall be recoverable after he has signed an agreement to proceed on a voyage, until such voyage shall have been concluded. 6th S. L., 557, sec. 2.

Not more than one dollar recoverable from a seaman during contract.

No sum exceeding one dollar, shall be recoverable from any seaman or mariner by any one person, for any debt contracted during the time such seaman or mariner shall actually belong to any ship or vessel, until the voyage, for which such seaman or mariner engaged, shall be ended. 1st S. L. U. S., 104, sec. 4.

His goods.

It shall not be lawful for any keeper of a public or lodging house for seamen, to withhold or detain any chest, bed or bedding, clothes, tools, or other effects of any seaman, for any debt, alledged to have been contracted by such seaman; and in case any such chest, bed, bedding, clothes, tools, or other effects, as aforesaid, shall be withheld or detained contrary to this Act, it shall be lawful for any justice of the peace, upon complaint, upon oath, to be made by any such seaman, or on his behalf, to inquire into the matter, and if he shall see right, by warrant under his hand and seal, to cause any such property

or effects so withheld or detained contrary to this Act, to be seized and delivered over to the seaman.—6th S. L., 557, sec. 3.

2d. Of Deserters.

If any seaman or mariner, who shall have signed a contract to perform a voyage, shall, at any port or place, desert, or shall absent himself from such ship or vessel, without leave of the master or officer commanding in the absence of the master, it shall be lawful for any justice of peace, within the United States, (upon the complaint of the master,) to issue his warrant to apprehend such deserter, and bring him before such justice; and if it shall then appear, by due proof, that he has signed a contract within the intent and meaning of this Act, and that the voyage agreed for is not finished, altered, or the contract otherwise dissolved, and that such seaman or mariner has deserted the ship or vessel, or absented himself without leave, the said justice shall commit him to the house of correction, or common jail of the city, town or place, there to remain until the said ship or vessel shall be ready to proceed on her voyage, or till the master shall require his discharge, and then to be delivered to the said master, he paying all the cost of such commitment, and deducting the same out of the wages due to such seaman or mariner. 1st S. L. U. S. 105, sec. 7.

On application of a consul or vice-consul of any foreign government, having a treaty with the United States, stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government, while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the time of desertion, to the crew of said vessel, it shall be the duty of any Court, judge, justice, or other magistrate having competent power, to issue warrants to cause the said person to be arrested for examination; and if, on examination, the facts stated are found to be true, the person arrested, not being a citizen of the United States, shall be delivered up to the said consul or vice-consul, to be sent back to the dominions of any such government, or, on the request, and at the expense of the said consul or vice-consul, shall be detained until the consul or vice-consul finds an opportunity to send him back to the dominions of any such government: *Provided*, nevertheless, that no person shall be detained more than two months after his arrest; but, at the end of that time, shall be set at liberty, and shall not be again molested for the same cause: and provided further, that if any such deserter shall be found to have com-

Seamen
deserting,
may be
apprehended
on warrant.

Foreign.
On applica-
tion of consul
or vice-
consul, to
be arrested
and deliver-
ed up.

Or detained
two months.

Unless
charged with
crime.

mitted any crime or offence, his surrender may be delayed until the tribunal before which the case shall be depending, or may be cognizable, shall have pronounced its sentence, and such sentence shall have been carried into effect. 4h S. L. U. S., 2169.

SEARCH WARRANT.

[See SEAMEN AND GAMING.]

1st. FOR WHAT IT MAY BE ISSUED, AND ITS EXTENT.

2d. OF THE EXECUTION.

3d. OF PROCEEDINGS ON RETURN.

4th. PRECEDENT.

1st. *For what it may be Issued, &c.*

Only in case
of stolen
goods.

A search warrant, at common law, may be issued, only in cases of stolen goods, and the practice, even to this extent, having crept into the law, is to be proceeded in with great caution. In *Entick's case*, it was held that a warrant to search for the author of a seditious libel, and to seize and carry away his papers, was illegal and void. 2d State Trials, 321.

Requisites
and formal-
ties.

In the same case, Lord Camden lays down the following rules; 1st. There must be a full charge upon oath, of a theft committed; 2d. The owner must swear that the goods are lodged in such a place; 3d. He must attend at the execution of the warrant, to shew them to the officer, who must see that they answer the description. And, lastly, the owner must abide the event at his peril; for if the goods are not found, he is a trespasser; and the officer being an innocent person, will be always a ready and convenient witness against him. 2d Hawkins, 135.

Must not be
general.

Though it has been usual for justices to grant general warrants, to search all suspected places for stolen goods, yet such practice is generally condemned by the best authorities. 4th Burns, 25.

Lord Hale says, a general warrant to search for felonies or stolen goods, is not good. And the same great author, in his *Pleas of the Crown*, thus expresses himself: "I do take it, that a general warrant, to search in all suspected places, is not good; but only to search in such particular places, where the party assigns before the justice his

suspicion, and the probable cause thereof; for these warrants are judicial acts, and must be granted upon examination of the fact.—Ibid, 26.

Mr. Hawkins says, he does not find any good authority that a justice can justify sending a general warrant, to search all suspected houses in general, for stolen goods; because, such warrant seems to be illegal on the very face of it; for it would be extremely hard to leave it to the discretion of a common officer to arrest what persons, and search what houses he thinks fit; and if a justice cannot legally grant a *blank warrant* for the arrest of a single person, leaving it to the party to fill up, surely he cannot grant such *general warrant*, which might have the effect of an hundred blank warrants.—Ibid.

A justice cannot, upon a *bare surmise*, make a warrant to break any man's house, to search for a felon, or for stolen goods; for the justices being created by Act of Parliament, have no such authority by any Act of Parliament; and it would be full of inconvenience, that it should be in the power of any justice of the peace, being a judge of record, upon a bare suggestion, to break the house of any person, of what degree soever, either in the day or night, upon such surmises.—Ibid.

But on a complaint, and oath made, of goods stolen, and that the party suspects they are in such a house, and shews the cause of his suspicion, the justices may grant a warrant to search in the suspected place mentioned in his warrant, and to attach the goods, and the party in whose custody they are found, and bring them before him, or some other justice, to give an account how he came by them, and farther to abide such order, as to law shall appertain.—Ibid.

21. Of the Execution.

A search warrant, according to Lord Hale, should require the search to be made in the day time; and, though he does not absolutely declare that it is unlawful without such restriction, yet he says they are very inconvenient without it; for many times, under pretence of searches made in the night, robberies and burglaries have been committed; and at best, it creates great disturbances. 4th Burns, 26.

Yet, in case of positive proof, it is proper to execute the warrant in the night time, lest the offenders and goods should be gone before morning.—Ibid, 27.

Whether the stolen goods are in a suspected house, or not, the officer and his assistants may enter in the day time, the doors being open, to make search, and it is justifiable by the warrant.—Ibid.

If the door be shut, and, on demand, if refused to be opened by

Officer may
break open
doors.

those within, the officer may break open the door, if the stolen goods are there; and if they are not there, the officer seems indemnified, because he searched by warrant, and could not know whether the goods were there, till search made: but it seems that the party who made the suggestion is punishable in this case.—Ibid.

3d. Of Proceedings on Return.

Goods, how
disposed of.

On the return of the warrant executed, the following objects ought to be attended to by the justice: with respect to the goods brought before him, if it shall appear that they were not stolen, they are to be restored to the possessor: if it shall seem clear that they were stolen, they are not to be delivered to the proprietor, but deposited in the hands of the sheriff or constable, that the party robbed may proceed by indicting and convicting the offender, to have restitution. 4th Burns, 27.

Person, how
disposed of.

With regard to the person who had the custody of the goods, if they were not stolen, he is to be discharged; if stolen, though not by him, but by another, who sold or delivered them to him, and it shall appear that he was ignorant of their having been stolen, he may be discharged as an offender, and bound over to give evidence as a witness against the person who sold them: if it shall appear that he knew they were stolen, he must be committed, or bound over to answer the felony.—Ibid.

4th. Precedent.

Form of a Search Warrant.

DISTRICT. } ss.

To any lawful Constable.

Whereas, it appears to me, I. P., one of the magistrates in and for the said Parish, by the information of A. I., of _____, in the parish aforesaid, that the following goods, to wit: _____ have within these _____ days last past, by some person or persons unknown, been feloniously taken, stolen and carried away out of the house of the said A. I., at _____ aforesaid, in the parish aforesaid; and that the said A. I. hath probable cause to suspect, and doth suspect, that the said goods, or part thereof, are concealed in the dwelling house of A. O., of _____, in the said parish; these are, therefore, to authorize and require you, with necessary and proper assistants, to enter into the said dwelling-house of the said A. O., at _____ aforesaid, in the parish aforesaid, and there diligently to search for the said goods; and if the same, or any part thereof, shall be found, upon such search,

that you bring the goods so found, and also the body of the said A. O., before me, or some other magistrate, in the parish aforesaid, to be disposed of, and dealt withal according to law.

Given under my hand and seal, at in the parish aforesaid,
this day of in the year

I. P., [L. S.]
Magistrate.

SELLING SPIRITS TO SLAVES.

If any free white person, being a distiller, vender, or retailer of spirituous liquors, shall sell, exchange, give, or in any otherwise deliver any spirituous liquors to any slave, except upon the written and express order of the owner or person having the care and management of such slave, such person, upon conviction, shall be imprisoned not exceeding six months, and be fined not exceeding one hundred dollars; and any free person of color or slave, shall, for each and every such offence, incur the penalties prescribed for free persons of color or slaves for teaching slaves to read or write. 7th S. L., 469.

Penalty for
selling spirits
to a slave
without
written
orders.

Upon the trial of any person, having the use and occupation of any shop, store, or house of any kind, used for dealing, trading or trafficking, indicted for dealing, trading or trafficking with any slave or slaves, without a permit so to deal, trade or traffic, from under the hand of the owner, or person having the care and management of such slave, it shall be sufficient for the conviction of such person, to prove, upon the charge of buying from such slave, that the slave entered such shop, store, or house used for trading, with the article or articles charged in the indictment to have been sold to such defendant, and left the said shop, store, or house used for trading, without the same; and upon the charge for selling to said slave any article charged in said indictment, it shall be sufficient evidence of such sale, to prove that said slave entered said store, shop, or house used for trading, without such article, and left the said store, shop, or house with such article.—Ib.

What is
evidence of
unlawful
traffic.

S L A V E S .

[See also, ASSEMBLIES, INSURRECTION, TICKETS, TRADING WITH
A SLAVE.]

- 1st. WHO SHALL BE DEEMED SLAVES.
- 2d. HOW EMANCIPATED, AND OF THEIR SEIZURE IF SET FREE
UNLAWFULLY.
- 3d. OF THEIR OFFENCES.
- 4th. PROCEEDINGS ON TRIAL.
- 5th. PUNISHMENT.

1st. Who shall be deemed Slaves.

All negroes and indians, (free indians in amity with this government, and negroes, mulattoes, and mestizoes, who are now free, excepted,) mulattoes or mestizoes, who now are, or shall hereafter be, in this province, and all their issue and offspring, born or to be born, shall be, and they are hereby declared to be, and remain forever hereafter, absolute slaves, and shall follow the condition of the mother, and shall be deemed, held, taken, reputed and adjudged in law, to be chattels personal, in the hands of their owners and possessors, and their executors, administrators and assigns, to all intents, constructions and purposes whatsoever; *provided always*, that if any negro, indian, mulatto or mestizoe, shall claim his or her freedom, it shall and may be lawful for such negro, indian, mulatto or mestizoe, or any person or persons whatsoever, on his or her behalf, to apply to the justices of his Majesty's Court of Common Pleas, by petition or motion, either during the sitting of the said Court, or before any of the justices of the same Court, at any time in the vacation; and the said Court, or any of the justices thereof, shall, and they are hereby fully empowered to, admit any person so applying, to be guardian for any negro, indian, mulatto or mestizoe, claiming his, her, or their freedom; and such guardians shall be enabled, entitled, and capable in law, to bring an action of trespass in the nature of ravishment of ward, against any person who shall claim property in, or who shall be in possession of, any such negro, indian, mulatto or mestizoe; and the defendant shall and may plead the general issue on such action brought, and the special matter may and shall be given in evidence, and upon a general or special verdict found, judgement shall be given according to the very right of the cause, without having any regard to any defect

in the proceedings either in form or substance; and if judgement shall be given for the plaintiff, a special entry shall be made, declaring that the ward of the plaintiff is free, and the jury shall assess damages which the plaintiff's ward hath sustained, and the Court shall give judgement, and award execution, against the defendant for such damage, with full costs of suit; but in case judgement shall be given for the defendant, the said Court is hereby fully impowered to inflict such corporal punishment, not extending to life or limb, on the ward of the plaintiff, as they, in their discretion, shall think fit; *provided always*, that in any action or suit to be brought in pursuance of the direction of this Act, the burthen of the proof shall lay on the plaintiff, and it shall be always presumed, that every negro, indian, mulatto and mestizoe, is a slave, unless the contrary can be made to appear, (the indians in amity with this government excepted,) in which case the burthen of the proof shall lie on the defendant; *provided also*, that nothing in this Act shall be construed to hinder or restrain any other Court of law or equity in this province, from determining the property of slaves, or their right of freedom, which now have cognizance or jurisdiction of the same, when the same shall happen to come in judgement before such Courts, or any of them, always taking this Act for their direction therein. 7th S. L., 397, sec. 1.

2d. How Emancipated.

No slave shall hereafter be emancipated but by Act of the legislature. 7th S. L., 459.

Any bequest, deed of trust, or conveyance, intended to take effect after the death of the owner, whereby the removal of any slave or slaves, without the limits of this State, is secured or intended, with a view to the emancipation of such slave or slaves, shall be utterly void and of no effect, to the extent of such provision; and every such slave, so bequeathed or otherwise settled or conveyed, shall become assets in the hands of any executor or administrator, and be subject to the payments of debts, or to distribution amongst the distributees or next of kin, or to escheat, as though no such will or other conveyance had been made. Act 1841, 154.

Any gift of any slave or slaves, hereafter made, by deed or otherwise, accompanied by a trust, secret or expressed, that the donee shall remove such slave or slaves from the limits of this State, with the purpose of emancipation, shall be void and of no effect; and every such donee or trustee shall be liable to deliver up the same, or held

Any bequest, trust or conveyance, for the removal and emancipation of a slave, after the death of owner, to be void, etc.

Any gift, conditioned for such removal, etc. to be void, etc.

to account for the value thereof, for the benefit of the distributees, or next of kin.—Ib.

If set free,
may be
seized.

In case any slave shall hereafter be emancipated, otherwise than according to this Act, it shall and may be lawful for any person whosoever, to seize and convert to his or her own use, and to keep as his or her property, the said slave so illegally emancipated or set free. 7th S. L., 443.

The Act of 1800, authorizing any person to seize and convert to his own use, a slave emancipated contrary to the provisions of that Act, is not repealed by the Act of 1820, prohibiting the emancipation of slaves except by Act of the Legislature; but both Acts are to be construed together as parts of one system. *Linam vs. Johnson*, 2d Bailey, 137.

The right of seizure by strangers is inconsistent with a right of property, or a right of possession, in the former owner: therefore, where the latter has emancipated a slave contrary to law, although he may have the right to reclaim him by seizure and conversion, under the Act of 1800, yet, without such seizure, he has no right on which he can maintain trover, although the slave has not been formally seized, and converted by any other person.—Ib.

So, if the owner, without a formal act of emancipation, permit his slave to go at large, and to exercise all the rights, and enjoy all the privileges of a free person of color, the slave becomes liable to seizure as a derelict, and the owner cannot maintain trover for him, without previously reclaiming him by seizure and conversion under the Act of 1800.—Ib.

A deed with
secret trust,
no violation.

A deed of a slave, absolute on its face, but with a secret trust, to let the negro go at large as a freeman, or with a view to future emancipation, is no violation of the Act of 1820, and is obligatory between the parties; until emancipation actually takes place, the right of property remains in the grantee. *Cline vs. Caldwell*; 1st Hill, 423.

But by Act of 1841, p. 155, sec. 3; any bequest, gift, or conveyance, of any slave or slaves, accompanied with a trust or confidence, either secret or expressed, that such slave or slaves shall be held in nominal servitude only, shall be void and of no effect; and every donee or trustee, holding under such bequest, gift, or conveyance, shall be liable to deliver up such slave or slaves, or held to account for the value, for the benefit of the distributees, or next of kin, of the person making such bequest, gift, or conveyance.

3d. Of their Offences.

If any slave, in this Province, shall commit any crime or offence whatsoever, which, by the laws of England or of this Province, now in force, is or has been made felony, without the benefit of the clergy, and for which the offender, by law, ought to suffer death, every such slave, being duly convicted according to the directions of this Act, shall suffer death; to be inflicted in such manner as the justices, by and with the advice and consent of the freeholders, who shall give judgement on the conviction of such slave, shall direct and appoint. 7th S. L., 402.

If any slave, free negro, mulatto, Indian or mestizo, shall wilfully and maliciously burn or destroy any stack of rice, corn or other grain, of the product, growth, or manufacture of this Province, or shall wilfully and maliciously set fire to, burn or destroy any tar kiln, barrels of pitch, tar, turpentine, or rosin, or any other the goods or commodities of the growth, produce or manufacture of this Province, or shall feloniously steal, take or carry away any slave, being the property of another, with intent to carry such slave out of this Province, or shall wilfully or maliciously poison or administer any poison to any person, free man, woman, servant or slave, every such slave, free negro, mulatto, Indian, (except as before excepted,) and mestizoe, shall suffer death as a felon.—Ibid.

Any slave who shall be guilty of homicide of any sort, upon any white person, except by misadventure, or in defence of his master, or other person under whose care and government such slave shall be, shall, upon conviction thereof, as aforesaid, suffer death; and every slave who shall raise or attempt to raise an insurrection in this Province, shall endeavor to delude or entice any slave to run away and leave this Province, every such slave and slaves, and his and their accomplices, aiders and abettors, shall, upon conviction as aforesaid, suffer death.—Ibid.

Such part of the above paragraph as relates only to slaves endeavoring to delude or entice other slaves to run away and leave this province, shall not operate or take effect, unless it shall appear that such slave (so endeavoring to delude or entice other slaves to run away and leave this Province,) shall have actually prepared provisions, arms, ammunition, horse or horses, or any boat, canoe, or other vessel, whereby such their intentions shall be manifested; any thing in the said Act to the contrary thereof notwithstanding. 7th S. L., 423.

If any slave shall presume to strike any white person, such slave,

Slaves who strike a white person how to be dealt with.

upon trial and conviction before the justice or justices, and freeholders, aforesaid, according to the directions of this Act, shall, for the first and second offence, suffer such punishment, as the said justice and freeholders, or such of them as are empowered to try such offences, shall, in their discretion, think fit, not extending to life or limb; and for the third offence, shall suffer death. But in case any such slave shall grievously wound, maim or bruise, any white person, though it be only the first offence, such slave shall suffer death. *Provided*, always, that such striking, wounding, maiming or bruising, be not done by the command, and in the defence of, the person or property of the owner or other person having the care and management of such slave, in which case, the slave shall be wholly excused, and the owner or other person having the care and government of such slave, shall be answerable, as far as by law he ought. 7th S. L., 405.

Assault on white woman, with intent to commit rape.

Any slave or free person of color, who shall commit an assault and battery on a white woman, with intent to commit a rape, on being thereof convicted, shall suffer death without the benefit of clergy. Act 1843, p. 258.

Harboring.

If any free negro, mulatto, or mestizoe, or any slave, shall harbor, conceal or entertain any slave that shall run away, or shall be charged or accused with any criminal matter, every free negro, mulatto and mestizoe, and every slave, who shall harbor, conceal or entertain any such slave, being duly convicted thereof, according to the directions of this Act, if a slave, shall suffer such corporal punishment, not extending to life or limb, as the justice or justices who shall try such slave, shall, in his or their discretion, think fit. 7th S. L., 407.

Not to travel the highway in numbers.

No men slaves, exceeding seven in number, shall hereafter be permitted to travel together in any high road in this Province, without some white person with them; and it shall and may be lawful for any person or persons, who shall see any men slaves, exceeding seven in number, without some white person with them, as aforesaid, travelling or assembled together in any high road, to apprehend all and every such slaves, and shall and may whip them, not exceeding twenty lashes on the bare back. 7th S. L., 413.

Not to distil or vend spirituous liquors.

No free person of color or slave, shall keep, use or employ, a still or other vessel on his own account, for the distillation of spirituous liquors, nor be employed or concerned in vending spirituous liquors of any description; and if any free person of color, or slave, shall offend against the true intent and meaning of this Act, he shall, on conviction thereof, be deemed guilty of a misdemeanor, and punished by

ipping on the bare back, not exceeding fifty lashes, at the discretion of the Court, before which he shall be tried. 7th S. L., 467. If any free person of color or slave, shall be convicted of keeping, employing, or using a still or other vessel, for the distillation of spirituous liquors on his own account, the still or other vessel so kept, used or employed, shall be considered as forfeited. And the justice granting such warrant against such free person of color or slave, shall issue execution directed to any constable or lawful officer, requiring him to seize and sell such still or other vessel, giving the usual public notice of sale; and the monies arising therefrom, shall be paid into the hands of the Commissioners of the Poor, for the use of the poor of the district—Ibid.

No owner of a slave, nor any person having charge of a slave, shall offer such slave to be employed or concerned in vending of spirituous liquors of any kind or description, in any quantity whatever; and any person offending against the true intent and meaning hereof, shall, on conviction thereof, be held guilty of a misdemeanor, and shall be fined or imprisoned at the discretion of the Court, not exceeding one hundred dollars fine, nor one month's imprisonment.—Ibid.

If any slave or free person of color shall hereafter commit any trespass, the commission of which, by a white man, would subject him to a civil action, and for which no penalty is already imposed by law on a slave or free person of color, such slave or free person of color, thus trespassing, shall be adjudged guilty of a misdemeanor; and, on conviction thereof, shall be punished at the discretion of the Court, by which he is tried, not extending to life or member. 7th S. L., 468.

If any person shall hereafter teach any slave to read or write, or shall aid or assist in teaching any slave to read or write, or cause or procure any slave to be taught to read or write, such person, if a free white person, upon conviction thereof, shall, for each and every offence against this Act, be fined not exceeding one hundred dollars, and imprisoned not more than six months; or, if a free person of color, shall be whipped, not exceeding fifty lashes, and fined, not exceeding fifty dollars, at the discretion of the Court of magistrates and freeholders, before which such free person of color is tried; and if a slave, to be whipped at the discretion of the Court, not exceeding fifty lashes; the informer to be entitled to one half of the fine, and to be a competent witness. And if any free person of color or slave, shall keep any school, or other place of instruction, for teaching any slave or free person of color to read or write, such free person of color or slave, shall be liable to the same fine, imprisonment and corporal

punishment, as are by this Act imposed and inflicted on free persons of color and slaves, for teaching slaves to read or write.—*Ibid.*

Giving a ticket to trade.

If any person, other than the owner or individual, having charge of any slave, or other person authorized by such owner or individual having charge of such slave, shall write or give such slave a permit, either in his own name, or any other name, to sell or trade in any article or commodity, for the sale whereof, a permit is now required by law, such person, if a slave or free person of color, shall be whipped according to the discretion of the magistrates and freeholders, before whom he or she is convicted. 6 S. L., 516.

All offences against the law, which would be punishable in a white person, are also punishable, if committed by a slave. "It being a general rule, that no person shall be excused from disobedience to the laws, except such as are expressly defined and excepted by the laws themselves." 4th Bl. C., 21.

4th. *Proceedings on Trial.*

To be tried before a magistrate and five freeholders,

One day's notice to owner, etc.

Freeholders, how chosen.

Oath.

Charge and judgement in writing, and signed.

All offences committed by a slave or free person of color, shall be tried before a magistrate and five freeholders; and the Court shall be organized as follows: the magistrate before whom the complaint is made, shall summon eight neighboring freeholders to attend at a day and place, to be designated, whereof at least one day's notice shall be given to the free person of color, or to the owner, overseer, or other person having the care and control of a slave to be tried, if to be found; and on the day of trial, the free negro, or owner, or overseer, or other person aforesaid, shall be permitted to select five from the eight freeholders, to sit upon the trial; but in case the person having the right of selection, shall refuse to make it, or shall fail to attend, the magistrate shall make the selection; and to each of the freeholders, so selected, shall be administered by the magistrate, the following oath: "You do solemnly swear, that you will well and truly try the case now pending before you, and adjudge the same according to the evidence, so help you God:"—whereupon, the Court shall be organized. The magistrate shall state distinctly the offence for which the prisoner is on trial, in writing, and annex thereto a written statement of the testimony. The judgement of the Court shall be rendered in writing, and signed by the magistrate, and any four of the freeholders, or by the whole, if they agree, and shall be returned to be filed in the clerk's office of the district: if the prisoner be found guilty, the sentence shall be pronounced by the magistrate, and subjoined in writing to the judgement of the Court. For good cause shewn, to be deter-

nined by the magistrate, against any freeholder, another shall be substituted in his place. When any slave or free person of color shall be sentenced to death, sufficient time shall be allowed to permit an appeal to be made, as is provided in the third section of the Act, entitled, "an Act to abolish certain punishments, and amending the law for the trial of slaves and free persons of color," passed in December, 1833, and such report of the case shall be made by the magistrate as is therein prescribed, and in all such cases a sufficient time shall also be allowed for an application to the governor for a pardon. Act 1839, p. 22, sec. 28.

Right to challenge.
Time allowed for appeal and pardon.

In case any slave shall be put to death, in pursuance of the sentence of a Court of magistrates and freeholders within this State, the Court imposing such sentence, or a majority of them, shall, before they order such sentence to be executed, appraise any such slave at any sum not exceeding two hundred dollars, and shall certify such appraisement to the treasurer of the division within which such proceedings may be had, who shall be authorized and required to pay the same to the owner of such slave. Act 1843, p. 264, sec. 1st.

Appraisement and compensation to the owner.

By the 32d section of the Act of 1839, the parishes of St. Philips and St. Michaels, are excepted, in certain cases, from the operation of the same. Therefore, Courts for the trial of slaves in said parishes, are to be constituted and guided by the following Acts.

St. Philips and St. Michaels.

The two judicial magistrates elected for the city of Charleston, by the board of magistrates, in pursuance of an Act passed in December, 1830, entitled "an Act for the further regulation of magistrates and constables of the parishes of St. Philip and St. Michael," shall have exclusive right of presiding over all Courts, in the said city of Charleston, organized for the trial of slaves, and other persons of color, charged with offences punishable by law; and in such cases where the offence charged calls for two justices to sit on the Court, as is the case in some instances, the presiding magistrate may call to his assistance either the other judicial or a ministerial magistrate; *provided*, the ministerial magistrate so called, be other than the one who brings up the cause for trial; and it shall be the duty of the ministerial magistrates, and they shall have the exclusive right of issuing all process in the said Court; and it shall be the duty of such ministerial magistrate who institutes a cause for trial, to attend and conduct the same as prosecuting officer; and the said judicial magistrates, and their assistants, in those cases where assistant justices are required by law, shall each receive the sum of two dollars for docketing and trying

Judicial magistrates to preside.

Two magistrates, one ministerial, to sit in capital cases.

Ministerial, to conduct process.

each cause that shall be brought before them, to be paid as magistrates are now paid in the trial of slaves and other persons of color; and the other or ministerial magistrates shall receive all other fees authorized by law in magistrates' cases, and the additional sum of twenty-five cents for attending and conducting each trial. 6th S. L., 457.

Extended to
the Neck.

All prosecutions of slaves or free persons of color, for crimes and misdemeanors, arising within the parishes of St. Philip and St. Michael, shall be tried and adjudged before the judicial magistrates, in the same manner and form as is now prescribed by law for such cases arising within the limits of the city of Charleston. 6th S. L., 559.

The magistrates of Charleston Neck shall act only as ministerial magistrates in the cases included in the preceding clause, and shall receive the same fees as are now received by the ministerial magistrates of the city, and they shall also be eligible to the office of judicial magistrate.—Ib.

Slave-holders
may sit.

All slave-holders or owners, within the said parishes, shall be invested with the powers and jurisdiction, and subject to the liabilities and penalties of freeholders, in relation to the trial of negroes and persons of color, within the said parishes. 6th S. L., 388, sec. 15.

Three
jurors.

Three freeholders, or slaveholders, shall hereafter be necessary for the trial of any slave or free person of color, for any offence not capital, within the said parishes, instead of two, as now established by law. 6th S. L., 419, sec. 5.

Certain persons
to sit on
trial.

All freeholders or slaveholders to sit on trials of slaves or free persons of color, and all jurors to sit on causes between landlord and tenant, under the Acts of 1812, and the amendatory Act of 1817, and in all cases of forcible entry and detainer, the freeholders or slave-holders, and jurors aforesaid, shall be drawn by the ministerial magistrate, in the presence of the judicial magistrate at the time of docketing the cause for trial, from a box to be kept by the judicial magistrates for that purpose, in which box there shall be two apartments, marked Nos. 1 and 2. 6th S. L., 486, sec. 2.

Jury boxes to
be kept.

To enable the magistrates sforesaid to carry the clause last aforesaid into effect, the board of magistrates shall, once at least in every three years, procure from the treasurer of the city of Charleston, a list of such persons as may be liable to serve as freeholders, or slaveholders, or jurors, and the names thus procured shall be placed in apartment No. 1, in said box, and be thence drawn and deposited from time to time, as they may be drawn, in apartment No. 2, until apartment No. 1 be entirely exhausted, when the contents of apartment

No. 2 shall be transferred to No. 1, and the mode repeated. Ibid, sec. 3.

The freeholders and slaveholders to sit upon all trials arising within the said parishes, shall be drawn from all the freeholders and slaveholders of the said parishes, as is now prescribed by law, their names to be taken from the tax collector's returns for the said parishes. 4th S. L., 559, sec. 4.

The penalty for non-attendance, as a freeholder or slaveholder, in all cases triable as aforesaid, shall be ten dollars, recoverable by summons issued by the ministerial magistrate, and triable as is now the case in causes small and mean. Ibid, sec. 5.

When any slave or other person of color shall be charged with an offence not capital, a majority of the freeholders, with the concurrence of the presiding magistrate, are hereby authorized and empowered to find the verdict, and determine the nature and extent of the punishment to be inflicted; but when the freeholders are unanimous, the concurrence of the magistrate shall not be required; *provided, however*, that on the trial of a slave or other person of color, for any capital offence, the unanimous concurrence of the freeholders, and also one of the presiding magistrates, shall be necessary to conviction. 4th S. L., 458, sec. 2.

The judicial magistrates shall open a docket book, and keep it open every day during the sitting of the magistrate's Court, for the trial of causes small and mean, in which shall be entered all cases for the trial of slaves and other persons of color; and upon which entry being made, the judicial magistrate presiding shall appoint the time when the trial shall be had. Ibid, sec. 3.

5th. Punishment.

On the conviction of a slave for any offence not capital, the punishment shall be by whipping, confinement in stocks, or treadmill, and not otherwise: and on the conviction of a free person of color, for a like offence, the punishment shall be by whipping, confinement in stocks, treadmill, or prison or fine, and not otherwise; and on the conviction of a slave or free person of color, for a capital offence, the punishment shall be by hanging, and not otherwise. 6th S. L., 489, sec. 2.

In all cases whatever, wherein any slave or free person of color, shall be convicted of any offence, not capital, it shall and may be lawful, for the Court before which such conviction shall take place, to punish the said offender by imprisonment: *provided*, that nothing

in this Act contained, shall be construed to abolish any of the other punishments now provided by law in such cases. 6th S. L., 516.

Limitations.

In case of conviction of a slave for distilling or vending spirituous liquors, or for teaching a slave to read or write, the punishment must not exceed fifty lashes; but a free person of color, in addition to such punishment, is liable to a fine, not exceeding fifty dollars. 7th S. L., 467 and 68.

Fines in certain cases.

On the trial of any free person of color, within the said parishes, where the Court shall be of opinion that corporal punishment is unsuited to or insufficient for the offence, such Court may impose a fine upon the offender, to be levied and collected for the use and benefit of the State. 6th S. L., 388, sec. 16.

Punishment mitigated in certain cases.

It shall be lawful for justices, who shall pronounce sentence against slaves convicted of raising or attempting to raise an insurrection, or of deluding or enticing any slave to run away and leave this State, or of being accomplices, aiders or abettors therein, by and with the consent of the freeholders, if several slaves receive sentence at one time, to mitigate and alter the sentence of any whom they shall think may deserve mercy, and may inflict corporal punishment, other than death, on any such slave as they in their discretion may think fit; *provided always*, that one or more of the said slaves, who shall be convicted of the crimes aforesaid, where several are concerned, shall be executed for example, to deter others from offences of the like kind. 7th S. L., 403.

In all and every trial hereafter, for any offence committed by any negro or other slave, it shall and may be lawful to and for the justices and freeholders upon such trial, or a majority of them, to mitigate the punishment to be inflicted upon the offender, in all and every case where any favorable circumstance shall appear and induce them to be of opinion that such punishment ought to be mitigated. 7th S. L., 425, sec. 18.

SOLE TRADER.

Definition.

A sole trader is a married woman who carries on trade by herself without the intermeddling of her husband. 2d Bay, 112.

1st. IN WHAT TRADES, ONE MAY BE A SOLE TRADER.

2d. OF THE NOTICE REQUIRED.

3d. HER RIGHTS AND LIABILITIES, AND HOW SHE MAY SUE AND BE SUED.

1st. *In what Trades one may be a Sole Trader.*

The custom of appointing *feme coverts* sole traders, in this State, is derived from the custom of London, and applies only to such as are ^{Only in trade or commerce, not in farming.} engaged in *trade and commerce*; it never was intended to authorize any other pursuit in which the wife might engage; nor does the Act of 1823, or any other, confer any new power on married women, but only recognizes the existence of the custom, and provides regulations to prevent abuses under it. A *feme covert*, cannot therefore, carry on a farm, and purchase and hire negroes, in her own right, as a sole trader. *McDaniel vs. Cornwell*, 1st Hill, 428.

A *feme covert* cannot be made a *feme sole* carrier under the custom ^{Nor as a common carrier.} or under the Acts of the Legislature of 1823 and '24. *Ewart vs. Nagel*, 1st McMullan, 50.

The case of *Miller vs. Tollison*, Harper's Eq., 145, as recognized ^{May keep a tavern.} in *Ewart vs. Nagel*, 1st McMullan, 50, extends the right of a sole trader, to the keeping a tavern.

2d. *Of the Notice Required.*

No woman, having a husband living, shall be entitled, either at law ^{Notice for one month.} or in equity, to the rights of a free dealer, unless she shall give notice by publication in a public newspaper, of her intention to trade as a sole trader, which notice shall be published at least one month; and in case there is no newspaper published in the district, then the notice shall be published in the same way as sheriff's sales. 6th S. L., 212.

The notice required to be given, by publication, shall include the ^{Notice to include name, place of residence, &c.} name, place of residence, and occupation or profession of the husband of the sole trader, to the intent that the individual giving notice, may be better known. 6th S. L., 236, sec. 2.

3d. *Her Rights and Liabilities, and how she may Sue and be Sued.*

A wife is the sole mistress of property which she may acquire in the ^{Sole mistress of her separate estate.} character of a sole trader, free from the control of her husband; and where she survives her husband, she is entitled to a moiety of his estate, under the Act, and also to her separate estate. *Magrath vs. Robertson*, 1st Dess. Eq., 448.

Liabie on a
bond.

A *feme covert*, acting as a sole trader, may make a bond; but this power is confined to such bonds only as relate to, or are in some manner connected with, her business as a sole trader. *McDowall vs. Wood*, 2d N. & McC., 242.

For retailing
spirits.

A *feme covert*, sole trader, is liable to the penalty under the Ordinance of the city of Charleston of 1815, prohibiting retailers of liquors from selling to persons of color, though the liquor was handed to the negro by her husband, she being present, and he acting as her clerk. *City Council vs. Van Roven*. 2d McC., 465.

Husband to
be joined.

Any *feme covert*, being a sole trader in this Province, shall be liable to any suit or action to be brought against her for any debt contracted as a sole trader, and shall also have full power and authority to sue for and recover, naming the husband for conformity, from any person whatsoever, all such debts as have, or shall be contracted with her as a sole trader; and all proceedings to judgment and execution by or against such *feme covert*, being a sole trader, shall be as if such woman was sole, and not under coverture. 3d S. L., 620, sec. 10.

No suit can be brought by or against a *feme covert*, sole trader, unless her husband be joined. *Starr & Cleland vs. Taylor*, 4th M' Cord, 413.

In an action against a *feme sole* trader, her husband must be joined for conformity, and it is not sufficient that he has been served with a copy of the process, if he has not been regularly made a party to the action. *Dodd vs. Lewis*, 2d Bailey, 88.

STEALING.

[See LARCENY, CATTLE, &c.]

Stealing
slaves, made
felony.

All and every person and persons, who shall inveigle, steal and carry away any negro or other slave or slaves, or shall hire, aid, or counsel any person or persons to inveigle, steal or carry away, as aforesaid, any such slave, so as the owner or employer of such slave or slaves shall be deprived of the use and benefit of such slave or slaves, or that shall aid any such slave in running away or departing from his master's or employer's service, shall be, and he, she, and they is, and are hereby declared to be, guilty of felony; and being thereof convicted or attainted by verdict or confession, or being indicted

thereof, shall stand mute, or will not directly answer to the indictment, or will peremptorily challenge above the number of twenty of the jury, shall suffer death as felons, and be excluded and debarred of the benefit of clergy. 7th S. L., 426, sec. 1.

All and every person or persons, that shall carry away any schooner or pettiaugar, committed to his or their care and management, fraudulently, and with the intention to steal or deprive the owner of the property of the same, from any part of this Province to any other part thereof or elsewhere, whereby the owner of such schooner or pettiaugar, shall be deprived of them, or any of them, or the use and benefit of them, or any of them, shall be, and he and they is, and are hereby declared to be guilty of felony; and being lawfully convicted thereof, by verdict or confession, or being indicted thereof, shall stand mute, or will not directly answer to the indictment, or will peremptorily challenge above the number of twenty of the jury, or shall upon such indictment, be outlawed, shall suffer death as felons, and be excluded and debarred of and from the benefit of clergy.—Ibid, sec. 2.

Also carrying away schooners and pettiaugars.

SUMMONS.

[See CAUSES, SMALL AND MEAN.]

SUNDAY.

All and every person and persons whatsoever, shall on every Lord's Day apply themselves to the observation of the same, by exercising themselves thereon in the duties of piety and true religion, publicly and privately; and having no reasonable or lawful excuse, on every Lord's Day shall resort to their parish church, or some other parish church, or some meeting or assembly of religious worship, tolerated and allowed by the laws of this Province, and shall there abide orderly and soberly during the time of prayer and preaching, on pain and forfeiture for every neglect, the sum of five shillings, current money of this Province. 2d S. L., 396.

All persons to observe the Lord's Day.

No tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any worldly labor, business or work of their ordinary callings upon the Lord's Day, or any part thereof (works day).

And to abstain from labor on that day.

of necessity or charity only excepted;) and every person being of the age of fifteen years or upwards, offending in the premises, shall, for every such offence, forfeit the sum of five shillings.—Ibid.

Penalty for
selling goods
on Sunday.

No person or persons, whatsoever, shall publicly cry, shew forth, or expose to sale any wares, merchandizes, fruits, herbs, goods or chattels whatsoever, upon the Lord's Day, or any part thereof, upon pain that every person, so offending, shall forfeit the same goods so cried, or shewed forth, or exposed to sale.—Ibid.

No person to
travel on the
Lord's Day.

No drover, wagoner, butcher, higgler, they or any of their servants, or any other traveller or person whatsoever, shall travel on the Lord's Day by land; neither shall any person or persons whatsoever travel on the Lord's Day by water, in any barge, lighter, wherry, boat, canoe or pettiangar, excepting it be to go to the place of religious worship and to return again, or to visit or relieve any sick person, or unless the person or persons were belated the night before, and then to travel no further than to some convenient inn or place of shelter for that day, or upon some extraordinary occasion, for which he, she or they shall be allowed to travel under the hand of some justice of peace of this Province.—Ibid.

No sports or
pastimes to
be allowed
on the Lord's
Day.

No public sports or pastimes, as bear-baiting, foot-ball playing, horse-racing, interludes or common plays, or other unlawful games, exercises, sports or pastimes whatsoever, shall be used on the Lord's Day by any person or persons whatsoever, and every person or persons offending in any of the premises, shall forfeit for every offence the sum of five shillings, current money.—Ibid.

No public
house to
entertain any
guests on the
Lord's Day,
except
lodgers and
strangers.

No vintner, innholder, or other person keeping any public house of entertainment, shall entertain or suffer any person or persons whatsoever, excepting strangers or lodgers in such houses, to abide or remain in their houses or out-houses, yards, or orchard or fields, drinking or idly spending their time on the Lord's Day, upon the pains and penalties of five shillings for every person offending, payable by themselves, respectively, that shall be found so drinking or abiding in any such public house or dependancies thereof as aforesaid, and the like sum of five shillings, to be paid by the keeper of such house for every person entertained by them.—Ibid.

Duty of the
constables
and church
wardens of
Charleston.

The church-wardens and constables of Charleston, or any one or more of them, shall once in the forenoon and once in the afternoon, in the time of divine service, walk through the said town, to observe, suppress and apprehend all offences whatsoever, contrary to the true intent and meaning of this Act; and they shall have power, and are hereby authorized and empowered, to enter into any public house, or

suspected houses, to search for any such offenders, and in case they are denied entrance, shall have power, and are hereby authorized and empowered, to break open, or cause to be broken open, any of the doors of the said houses, and enter therein; and all persons whatsoever are strictly commanded and required to be aiding and assisting to any constables or other officers in their execution of this Act, on the penalty of ten shillings current money for every neglect.—Ib.

If any master, mistress or overseer, shall command, and cause and encourage any servant, slave or slaves, to work on the Lord's Day, No servant to work on the Lord's day. he, she or they shall forfeit for every such offence the sum of five shillings current money.—Ib.

For the better execution of all and every the foregoing orders, every justice of the peace within his county shall have power and authority to convene before him any person or persons whatsoever, Penalty for offences against this Act. who shall offend in any of the particulars before mentioned, and upon his own view, or confession of the party, or proof of any one or more witnesses, upon oath, which the said justices are by this Act authorized to administer, the said justice or justices shall give a warrant under his or their hands and seals, to the constables or churchwardens, or either or any of them, of the parish or parishes where such offence shall be committed, to seize the said goods cried, shewed forth, or put to sale as aforesaid, and to sell the same; and as to the other penalties and forfeitures, to impose the fine and penalty for the same, and to levy the said forfeitures and penalties by way of distress and sale of the goods of every such offender, returning the overplus (if any be) after reasonable charges allowed for the distress and sale; and in default of such distress, or in case of insufficiency or inability of the said defender to pay the said forfeiture or penalties, that then the party offending be set publicly in the stocks for the space of two hours. And all and singular the forfeitures or penalties aforesaid, shall be employed and converted to the use of the poor of the parish where the said offences shall be committed, and to be delivered into the hands of the overseers of the poor for that end, saving only that it shall and may be lawful to and for any such justice or justices, out of the said forfeitures or penalties, to reward any person or persons that shall inform of any offence against this Act, according to his or their directions, so as that such reward exceed not the third part of the forfeitures or penalties.—Ib.

Provided, nothing in this Act contained shall extend to the prohibiting of dressing of meat in families, or dressing or selling of meat in inns, victualing houses or other public houses, for such as cannot This Act not to prohibit the dressing meat nor selling mix.

be otherwise provided; nor to the buying and selling of milk before nine of the clock in the morning, or after four of the clock in the afternoon.—Ib.

Persons to be presented within ten days after offence.

Provided, also, no person nor persons shall be impeached, prosecuted or molested for any offence before mentioned in this Act, unless he or they be prosecuted for the same within ten days after the offence committed.—Ib.

No writ, process or warrant to be served on the Lord's day, except for treason, felony, or breach of the peace.

No person or persons, upon the Lord's day, shall serve or execute, or cause to be served and executed, any writ, process, warrant, order, judgement or decree, except in cases of treason, felony, or breach of the peace; but the service of every such writ, process, warrant, order, judgement or decree, shall be void to all intents and purposes whatsoever: and the person or persons so serving or executing the same, shall be liable to the suit of the party grieved, and to answer damages to him for doing thereof, as if he or they had done the same without any writ, process, warrant, order, judgement or decree at all; and in case any person or persons shall be imprisoned or detained in custody by any writ, process, warrant, order, judgement or decree so served or executed on the Lord's day, upon motion or petition made to the chief justice of the province, it shall be lawful for the said chief justice, and he is hereby authorized and required, immediately to order such person or persons to be discharged out of prison and custody, and to be clear not only from such writ, process, warrant, order, judgement or decree so served on the Lord's day, but also from all or any other writs, process, warrant, order, judgement or decree served or executed upon any person during the time of the said persons being imprisoned or detained, upon the account of any such writ, process, warrant, order, judgement or decree so served or executed on the Lord's day; and such person shall be allowed by the said chief justice such reasonable time as he shall think fitting, to return to his home or habitation, free from any arrest or hinderance whatsoever, in any civil matter.—Ib.

Persons sued may plead the general issue.

If any action, suit or information shall be commenced against any person or persons for what he or they shall do in pursuance or execution of this Act, such person or persons so sued, may plead the general issue, not guilty, and upon issue joined give this Act and the special matter in evidence; and if the plaintiff or prosecutor shall become non-suit, or suffer discontinuance, or if a verdict pass against him, the defendant or defendants shall recover his or their treble costs, for which he or they shall have the like remedy, as in any case where costs by law are given to the defendant.—Ib.

One Act of Assembly of this Province, entitled an Act for the better observation of the Lord's day, commonly called Sunday, ratified in open Assembly the fifteenth day of October, one thousand six hundred and ninety-two, and every clause, article, sentence, word, matter or thing contained in the same Act, from henceforth shall be repealed, unenacted, revoked, and forever made void; any thing in the said Act to the contrary in any wise notwithstanding.—Ib.

If any person in this province shall, on the Lord's day, commonly called Sunday, employ any slave in any work or labor, (works of absolute necessity, and the necessary occasions of the family, only excepted,) every person in such case offending, shall forfeit the sum of five pounds, current money, for every slave they shall so work or labor. 8th S. L., 404, sec. 22.

If a verdict is delivered in, on Sunday morning, after the expiration of the twelfth hour, it is void, and will be a good ground for a new trial, agreeable to the common law maxim, *dies dominicus, non est dies juridicus*. Shaw vs. McCombs; 2 Bay, 232.

It shall not be lawful for any owner or occupier of a grocery store, or retail shop, within the limits of Charleston Neck, or any store, shop or place, within the limits aforesaid, wherein are vended spirituous liquors, to keep open the said stores, shops or places, or to trade, traffic or barter therein, with negroes or persons of color, at any time on the Sabbath day, or on any other day, after the hours of nine o'clock, P. M., from the twentieth day of September to the twentieth day of March, and ten o'clock, P. M., from the twentieth day of March to the twentieth day of September, in each and every year; and in case any owner or occupant of any such store, shop or place, shall transgress or violate this Act, by keeping open the said stores, shops or places, or by trading, trafficking or bartering therein, with any negroes or persons of color, at any time on the Sabbath day, or on any other day, after the hours of nine o'clock, P. M., from the twentieth day of September to the twentieth day of March, and ten o'clock, P. M., from the twentieth day of March to the twentieth day of September, in each and every year, he, she or they shall forfeit and pay the sum of one hundred dollars, to be recovered in any Court having competent jurisdiction; to be paid to the Commissioners of Cross Roads of Charleston Neck, for the use of said roads. 8th S. L., 497, sec. 2.

A former Act repealed.

Provision respecting grocery stores on Charleston Neck.

SURETY FOR THE PEACE.

[See BEHAVIOUR.]

S W E A R I N G .

The forfeitures of several degrees of persons for swearing.

If any person or persons shall profanely swear or curse in the presence or hearing of any justice of peace of the county, riding, or division, or of the mayor or other head officer, or justice of peace for any city or town corporate, where such offence is or shall be committed, or that shall be thereof convicted by oath of one witness, or by the confession of the party offending, before any justice of peace of the county, or mayor, or bailiff, or other chief officer or justice of the peace of such city or town corporate, where the said offence shall be committed; that then for every such offence, the party so offending shall forfeit and pay to the use of the poor of the parish where such offence or offences shall be committed, the respective sums hereinafter mentioned, that is to say, every servant, day laborer, common soldier and common seaman, 1s., and every other person 2s., and in case any of the persons aforesaid shall after conviction offend a second time, such person shall forfeit and pay double; and if a third time, treble the sum respectively by him or her to be paid for the first offence. 2d S. L., 537.

To be levied by distress.

Upon neglect or refusal of payment of the said forfeiture, any justice of peace of the county, riding, or division, or mayor or other head officer, or justice of peace, of any city or town corporate, where the said offences shall be committed, shall and are hereby authorized and required to direct and send his warrant to the constable, tything man, church-warden or overseer of the poor of the parish where the offence shall be committed, or where the offender shall inhabit, thereby commanding them, or some one or more of them, to levy, by distress and sale of the goods of the offender, the sum so forfeited, for the use of the poor of the parish as aforesaid; and in case no such distress can be had, then every such offender, being above the age of 16 years, shall, by warrant under the hand and seal of the said justice of peace, or other officer as aforesaid, be publicly set in the stocks for the space of one hour for every single offence, and for any number of offences

If no distress, offender to be put in the stocks.

whereof he shall be convicted at one and the same time, then two hours; and if the party offending be under the age of sixteen years, and shall not forthwith pay the said forfeitures, then he or she shall, by warrant as aforesaid, be whipped by the constable, or by the parent, guardian or master of such offender, in the presence of the constable.
Ibid.

If any justice of the peace, or chief magistrate, shall wilfully and ^{£5 penalty for justice of peace not executing the Act.} wittingly omit the performance of his duty in the execution of this Act, he shall forfeit the sum of five pounds, the one moiety to the use of the informer, to be recovered by action, suit, bill or plaint, in any of his majesty's courts at Westminster, wherein no essoin, protection, or wager of law, shall be allowed, nor any more than one imparlance.
Ibid.

If any action or suit shall be commenced or brought against any justice of peace, constable or other officer or person whatsoever, for doing or causing to be done any thing in pursuance of this Act, concerning the said offences, the defendant, in such action, may plead ^{Officer sued for executing this Act, may plead general issue, etc.} the general issue, and give the special matter in evidence; and if upon such action, verdict be given for the defendant, or the plaintiff become nonsuit, or discontinue his action, then the defendant shall have treble costs.—Ibid.

No person shall be prosecuted or troubled for any offence against this statute, unless the same be proved or prosecuted within ten days ^{Time for prosecuting upon this Act.} next after the offence committed.—Ibid.

This Act shall be publicly read four several times in the year in all parish churches, and all public chapels, by the parson, vicar or curate ^{To be read in churches, etc.} of the respective parishes or chapels, immediately after morning prayer, on four several Sundays, that is to say, the Sunday next after the 24th day of June, the 29th day of September, the 25th day of December, and the 25th day of March, under the pain of twenty shillings, for every such omission or neglect.—Ibid.

The justices of peace, mayor, or other head officer, shall register ^{Convictions to be registered.} in a book to be kept for that purpose, all the convictions made before him upon this Act; and the time of making thereof, and for what offence, and shall certify the same to the next general quarter sessions of the peace for the said county or place where the offences are committed, to be kept there upon record by the respective clerks of the peace, to be seen without fee or reward.—Ibid.

SWINDLING.

[See CHEATS.]

TAR, PITCH, ROSIN, &c.

Before the
articles are
sold, the
barrels to
have a burnt
mark.

All and every person and persons whatever, who shall sell or expose for sale in any part of this Province, any pitch, tar, rosin, turpentine, beef or pork, in any casks or barrels, shall first set on every such cask or barrel, a burnt mark, with the first letter of the christian name, and the surname at length, of the maker of such commodity, with an iron brand, hereby directed for that purpose; and if any person shall in any port or place of exportation within this Province, sell or expose to sale any of the said commodities herein before enumerated, in any cask or barrel, before the same be marked and branded as aforesaid, every such person shall, for every such cask or barrel, forfeit the sum of ten shillings, current money of this Province, to the person or persons who will inform and sue for the same, to be recovered before any justice of peace of this Province, in such manner as is provided by the Act for the trial of small and mean causes; and if any merchant, factor, trader or other person, shall ship or put on board any ship or vessel, any of the said commodities herein before enumerated, in any casks or barrels, with intent to export the same before such casks or barrels be marked and branded as aforesaid, every such merchant, factor, trader or other person, shall forfeit the sum of ten shillings, for every such cask or barrel, to be sued for, recovered and disposed of in manner aforesaid. 3d S. L., 686.

Penalty.

Barrels
containing
fraudulent
mixtures to
be forfeited.

If any planter or other person shall sell or expose for sale to any merchant, factor or any other person, at any port or place of exportation within this Province, any casks or barrels of rice, which, upon opening or uncasking the same, shall be found to contain any unfair and fraudulent mixture of small or damaged rice, then and in every such case, the seller of the said rice, or person offering the same to sale, shall immediately, on request of the buyer, or person offering to buy the same, name one indifferent person, being a freeholder, and the

said buyer another, to view the said rice, and if such two persons shall agree in opinion, and certify the same in writing, under their hands, that such rice was deceitfully and fraudulently packed and exposed for sale, every such cask or barrel, so fraudulently packed and exposed to sale, shall be and the same is hereby declared to be forfeited to his Majesty, for the use of the public of this Province, and to be applied in ease of the tax of the then current year, and the same shall be sold or caused to be sold by the public treasurer of the Province, or by the persons or person who shall condemn the same, for the use aforesaid, who shall be allowed thereout, five per cent. for their trouble: *Provided*, always, that if the seller shall refuse to nominate a person to view the said rice, that then the buyer shall nominate both the persons to view such rice, who shall have the same power as if one had been named by the seller and one by the buyer; *provided*, also, that in case the said persons nominated as aforesaid, shall not agree in opinion, they shall have power to nominate a third person, being a freeholder as aforesaid, who shall have the same power as the first two by this Act have; and in case either of the said two persons shall refuse or neglect to join, or cannot agree in nominating such third person, then and in such case, any justice of the peace, on notice given by both or either of the said persons, shall and he is hereby required to nominate such third person, which third person shall have the same power in the premises as if he had been nominated by both; *provided* lastly, that such adjudication and certificate shall be made within twenty-four hours from the first application, and the said certificate shall be deemed a sufficient condemnation of the said rice, to warrant the sale thereof as aforesaid; any law, statute, usage or custom, to the contrary notwithstanding.—*Ibid*.

Every person and persons in this Province, shall make his and their casks for packing beef or pork, of sound, dry and well seasoned white or water oak timber, without sap, the heads as well as bodies of which casks shall be made tight so as to hold pickle, and shall fill the said casks with water before the same is packed with any beef or pork.—*Ib*.

Barrels to be made of well seasoned white or water oak.

Every barrel of pitch which shall be made and sold in this Province, shall contain three hundred and twenty-two pounds gross weight; every barrel of tar shall contain thirty-two gallons; every barrel of pork or beef, shall contain thirty gallons and two hundred pounds weight of wholesome well cured meat in the same, which shall be weighed by the packers, and well packed with salt and pickle, each piece not to weigh more than eight pounds, and not to be cut or mangled further

Regulations concerning pork and beef.

Rosin and turpentine.

than to take out the kernels, or where the bones require it, and not more than two heads in one barrel of pork, but no beef heads or shanks shall at all be packed; and every barrel of rosin and turpentine shall be clean strained and merchantable, without chips, leaves, filth or dirt.—Ibid.

Cattle for package to be penned twelve hours before killing.

In case any person whoever, shall kill any cattle to put in barrels for sale, without having first penned them twelve hours before the killing them, every such person shall forfeit the sum of three pounds current money, for every head of cattle so killed, contrary to the directions of this Act, to the person who will inform and sue for the same, to be recovered before any justice of the peace, in such manner as is directed by the Act for the trial of small and mean causes.—Ibid.

Barrels of tar and turpentine to be marked by a public packer.

No merchant, factor, trader or other person, shall ship or put on board any ship or vessel for exportation from this Province, any tar or turpentine before the same be marked by some public packer, who shall be appointed for that purpose as by this Act is hereinafter directed; and if any person shall offend herein, he shall forfeit the sum of twenty shillings current money, for each cask or barrel so shipped for exportation before the same be marked as aforesaid, to be sued for and recovered before any justice of the peace of this Province, in such manner as is provided by the Act for the trial of small and mean causes, and the said forfeiture shall go to the informer.—Ib.

The packer may open suspected casks and barrels.

In case any public packer shall suspect any barrel or barrels of tar or turpentine, before he marks the same, to be fraudulent and deceitful, he shall acquaint the person treating for the purchase of the same, of such his suspicion, and shall be obliged to open and examine any such suspected cask or casks, barrel or barrels; and if the same shall appear to be fraudulently and deceitfully packed and exposed to sale, the same shall be forfeited, and sold by the treasurer to such persons as will expend and use the same within this Province, and applied to the same uses as is herein before directed in the case of rice.—Ibid.

At the risk of the person requiring it to be opened.

If any fraud or abuse shall be suspected in any barrel or barrels of pitch or rosin which shall be brought to market or exposed to sale, the person who shall treat for the purchase of such pitch or rosin, shall be at liberty to cut open as many barrels of the same as he shall think proper, which shall be liable to be viewed, judged and forfeited, as is herein before directed in the case of rice, and where any pitch or rosin shall be condemned as fraudulent by the person or persons empowered (as is hereinbefore directed with respect to rice) to view

and judge the same, all such condemned pitch and rosin shall be forfeited, and sold by the treasurer, and applied to such uses as is before directed in the case of rice : *provided always*, that where any pitch or rosin shall be ordered to be cut open as aforesaid, without the consent of the owner or person offering or exposing the same to sale, the same shall be done at the risk of the person who shall cause such pitch to be so cut open, (that is to say) if such pitch or rosin shall not be condemned as fraudulent by the person or persons empowered by this Act to view and judge the same, that then the person who caused the said pitch or rosin to be so cut open and examined, shall take to himself every such barrel so cut open, and which shall not be condemned as aforesaid, and shall pay to the owner or person offering the same to sale, the current sum or price which good pitch or rosin shall then be at, at that port or place, any thing hereinbefore contained to the contrary notwithstanding.—Ib.

Whenever any rice, pitch or rosin, shall be sent from any plantation, under the care or management of an overseer or manager, and where the employer does not then live, nor shall happen to be present, if such rice, pitch or rosin, shall by virtue of this Act be forfeited, on account of any unfair or fraudulent mixture, the loss of the rice, pitch or rosin so forfeited, shall fall upon the overseer or manager of that plantation where the same was packed or filled, and the master or owner of the said plantation shall have power to deduct the value of the rice, pitch or rosin so forfeited, out of the wages, share or stipend of such overseer or manager, or recover the same by legal process, if he shall think proper, unless such overseer or manager shall make it appear by the evidence of some white person, that to the best of his the said white person's opinion and belief, the barrels which contained the same were well headed and nailed or pegged in his presence, and that he saw the rice, pitch or rosin, fairly packed and filled in the same.—Ib.

In what cases the loss shall fall on the overseer.

No merchant, factor, trader or other person, shall ship for exportation, on board any ship or vessel, any beef or pork for a foreign market, before the same be packed by the public packer of that port or place where the same is intended to be shipped, and by the said packer marked or branded, on pain of every such person's forfeiting the sum of twenty shillings current money, for every such cask or barrel.—Ib.

Penalty on shipping casks, etc. not branded.

The packers of the several ports of this Province, shall severally and respectively be nominated and chosen yearly, at the time of choosing parish officers, by the freeholders of the respective parishes

Oath to be taken by the packers.

where such port is situate, who before they enter into the execution of their offices severally and respectively, shall take the following oath, before some neighboring justice of the peace for that county: I, A. B., do solemnly and sincerely swear, that I will faithfully and impartially execute the business and duty of a packer in the town and port of — without favor or prejudice to any person or party whatsoever, according to the best of my skill and judgement, and with the greatest expedition, so help me God. *Provided always*, that there shall be six packers for the port of Charleston, and two for each of the other ports, and no more.—Ib.

Number of
packers and
fees.

The public packers of the several ports of this Province, shall receive for their trouble, from the seller or owner of any tar, the sum of one shilling for each barrel, and no more, for packing and marking the same with a hot iron; and for every barrel of turpentine, six pence; which he or they shall mark or brand; and the sum of two shillings and six pence for every barrel of beef or pork which he or they shall pack and mark as aforesaid.—Ib.

Size of pipe
staves, &c.

All staves to be made for exportation, and all shingles, which shall be offered to sale in this Province, shall be made of good and sound timber, and shall be of the following dimensions, to wit: each pipe stave to be made of white oak, fifty-eight inches long, and not less than three quarters of an inch thick at the thin edge, and three inches broad, clear of sap; each hogshead stave to be made of red or white oak, forty-two inches long, not to be less than three quarters of an inch thick at the thin edge, and four inches broad, clear of sap; and each barrel stave, of red or white oak, to be thirty inches long, not to be less than half an inch thick at the thin edge, and four inches broad, clear of sap; and each shingle to be twenty-two inches in length, and not less than half an inch thick at the thick end, and well shaved, so as not to be winding, and not less than three inches and an half broad, clear of sap; and in case there shall be any dispute between the buyer and seller of any staves and shingles, concerning the merchantableness of them, the same shall be determined by the packers of the port or place in which such dispute may happen.—Ib.

Repealed by
Act of 1768.

14.	*	*	*	*	*	*
15.	*	*	*	*	*	*

Oath to be
taken.

Every person who shall be employed in the weighing rice, pitch, turpentine, beef, pork, or any other merchandise at any public scales in Charleston, or any other port in this Province, shall, before he take upon him to do the same, take the following oath before any of

his Majesty's justices of the peace, who are hereby impowered and required to administer the same, viz : I, A. B., do swear, that I will faithfully, equally and impartially weigh all rice, pitch, turpentine, beef, pork, or other merchandise that shall be weighed by me, so help me God. And any person weighing any rice or other merchandise whatever, who cannot or shall refuse to produce a certificate of his having taken the said oath, being thereto required by the owner or person who offers such merchandise to be weighed, shall forfeit and pay the sum of four pounds proclamation money, to be recovered according to the Act for the trial of small and mean causes, to be paid to and for the use of the informer; provided such information be made within six days after the offence is committed.—Ib.

Made perpetual by Act of 1783. 4th S. L., 541.

T E N D E R .

A tender is an offer to pay a debt or perform a duty. Bac. Ab. Tit. Tender.

- 1st. WHAT IS A GOOD AND LEGAL TENDER.
- 2d. OF THE TIME AND PLACE OF MAKING IT.
- 3d. OF THE CONSEQUENCES OF A TENDER.

1st. *What is a good and legal Tender.*

By the Constitution of the United States, Art. 1st, sec. 10, no State shall make any thing but gold and silver coin a tender in payment of debts; under which, it hath been ruled, that the copper coin of the United States is not a legal tender. Gold and silver.
Copper, not.

But, an offer in bank notes, of money due, may be a good legal tender, if no objection is made to it on that account, and it be refused on some other ground. Polglasse vs. Oliver, 1st Price, 133; Wright vs. Read, 3 T. R., 554. Bank note.

It is not enough for the person, who intends to make a tender, to say, I am ready to pay the debt, or perform the duty; but he must make an actual offer to pay the one, or perform the other. The mortgagor said to the mortgagee, I am here ready to pay you the Must be an actual tender.

money due upon the mortgage; but at the same time kept the money, which was in a bag, under his arm. This was holden not to be a good tender. But an actual offer of money in a bag is a good tender, provided it be proved, that the sum intended to be tendered, was in the bag; for it is usual to carry money in a bag, and it is the duty of the party who receives it to tell it, and to examine whether it be good. 5th Bac. Ab., 4.

Must be
certain and
uncon-
ditional.

It is a general rule, that a tender must be made unconditional, and must be always of a definite and certain character. *Eastland vs. Longshorn & Maxwell*; 1st N. & M'C., 194.

A party making a tender, is not entitled to require a receipt in full, where a larger sum than that tendered is claimed to be due: and where a receipt *pro tanto* was offered and refused, and a receipt in full insisted upon as a condition; held, that the tender was void. *Siter & Price, vs. Robinson*; 2d Bailey, 274.

A tender of a larger sum, requiring change, is not a good tender. *Robinson vs. Cook*; 6 Taun., 336.

2d. Of the time and place.

A tender cannot be made after the commencement of an action. The way to stop proceedings after an action is brought, is by obtaining a rule for leave to pay the money into Court. *Fishburne, Ex'or, vs. Sanders*; 1st N. & M'C., 242.

To save costs, it is too late to tender money after a writ has been taken out, and signed and sealed by the clerk, although it has not yet been lodged with the sheriff. The plaintiff has already incurred the costs, and if the defendant admits the debt, he must pay the costs accrued. But the defendant having paid the money into Court, which was taken out by the plaintiff, except so much as would pay the costs, it was held, that the plaintiff's accepting the money, discharged the defendant from payment of costs. Where a defendant gets the leave of Court, after action brought to pay money into Court, it is always upon condition, that he pays the costs then due. *Hinchie vs. Foster*, 4th McC., 253.

Defendant, after issue joined, by leave, paid money into Court. Plaintiff took the money out, and without requiring the defendant to pay the costs up to the time the money was paid into Court, proceeded for the balance of his demand. Verdict for defendant. New trial ordered, unless defendant pay all costs up to the time he paid the money into Court. *Broughton vs. Richardson*, 2d Rich., 64.

Where money is to be paid, or goods are to be delivered, at a place ^{Where time and place are fixed.} certain, upon or before a day certain, the tender must not only be made upon the last day limited for the payment or delivery, but it must also be made at the uttermost convenient time of that day: for as one party has until the uttermost convenient time of that day to pay the money, or deliver the goods, it would be unreasonable that the other should be obliged to attend for the receiving of the money or goods before that time. 5 Bac. Ab., 9.

But although the party, who ought to pay money, or deliver goods, has until the uttermost convenient time of the last day, limited for the payment or delivery, to pay the money or deliver the goods, a tender is not good, unless there be, after it is made, time enough, before the sun sets, to examine and tell the money, or to examine and take account of the goods: for if a man should be compelled to receive either money or goods in the dark, there would be great danger of his being imposed upon.—Ibid.

Notwithstanding the law gives the uttermost convenient time of the last day, limited for the payment of money or delivery of goods, to pay the money or deliver the goods, yet, as this is solely for the convenience of both parties, that neither may be obliged to give longer attendance than is necessary, if it happen that both parties meet at the place at any other time of the last day, or upon any other day within the time limited for the payment or delivery, and a tender be made, the tender is good.—Ibid.

If money is to be paid, or goods are to be delivered, at a place certain, notice, although no time be fixed for the payment or delivery, may be given to the party to whom the payment or delivery is to be made, that the money will be paid, or the goods delivered, upon a day therein mentioned; and a tender at the uttermost convenient time of that day is good. 5 Bac. Ab., 10.

If no place be appointed for the payment of money in gross, a tender must, if the person to whom the money is due be in the State, be made at the place where he is; but if he be out of the State, the party, who ought to pay the money, is not bound to go out of the State to seek him. 5 Bac. Ab., 6. ^{If no place be appointed.}

If no place be appointed for the payment of rent issuing out of land, a tender upon the land is good; for it is not in this case necessary to make a tender to the person. But although a tender to the person be not, in the case of rent issuing out of land, necessary, a tender to the person would, in such case, be good.—Ibid, 7.

Replevin lies to recover damages for the detainer after tender of the rent in arrear, if the tender were made before the goods were impounded, although not made until after the distress levied. *Hilson vs. Blain*, 2d Bailey, 168.

Tender *on the land*, to the bailiff, if the landlord is not present to receive the rent in arrear, renders the subsequent impounding of the goods distrainted tortuous; and the landlord is liable for the damages. *Ibid.*

3d. Of the Consequences of a Tender.

Stops interest and costs.

Tender, in paper currency, before it went out of circulation, is good, and shall stop interest from the time of such tender. *Petrie vs. Smith*, 1st Bay, 115.

In case of the tender of money, it discharges the subsequent interest and costs; 12 J. R., 274. And where the defendant, after action brought, and before declaration, has tendered the sum which he afterwards brings into Court, and offered to pay costs up to that time, it seems but reasonable that he should not be liable to the payment of any further costs.—1st Tidd's Prac., 567.

Admits a debt.

Bringing money into Court is an acknowledgement of the right of action, to the amount of the sum brought in; and therefore the plaintiff, on producing an office copy of the rule, is entitled to receive it at all events, whether he proceed in the action or not, and even though he be non-suited or have a verdict against him. And being an acknowledgement on record, the party can never recover it back again, though it afterwards appear that he paid it wrongfully. But bringing money into Court, is admission of a legal demand only. And beyond the amount of the sum brought in, it is no acknowledgement of the right of action; and therefore, if the plaintiff proceed further, it is at his peril.—*Ibid.*

Effect of subsequent demand.

A right to damages, on the account of the non-payment of a debt, or the non-performance of a duty, may, after being taken away by a tender and refusal, be restored by a demand subsequent to the tender and refusal; for if the debt or duty be not discharged by the tender and refusal, a new right to damages accrues, from the non-payment or the non-performance upon the subsequent demand. If A. have tendered a sum of money to B., and B. have refused to accept thereof; yet, if a demand be afterwards made by B., and the money be not paid, A. is liable to damages for non-payment from the time of the demand. 5th Bac. Ab., 13.

THEATRES, PLAYS, AND SHOWS.

The intendant and wardens of the city of Charleston, and the intendant and wardens in Camden, and the magistrates in each of the election districts throughout the State, may permit and license persons to exhibit theatrical entertainments, within the bounds of their respective jurisdictions, any thing contained in the Act, entitled, "An Act for the promotion of industry and suppression of vagrants, and other idle and disorderly persons," to the contrary thereof in any wise notwithstanding; and the persons who shall be so licensed are hereby excepted from the pains and penalties inflicted by the said Act; and for every license granted in the city of Charleston, a sum of one hundred pounds, and for every license granted elsewhere, the sum of twenty-five pounds, shall be paid into the public treasury, for the use of the State; and such license shall continue in force for one year from the granting thereof, and no longer. 5th S. L., 195.

Theatrical
exhibitions
to be
licensed.

The intendant and wardens of all incorporated towns and villages, shall have power to collect the taxes from all persons representing, publicly, within their respective corporate limits, for gain or reward, any plays or shows, of what nature or kind soever, which have hitherto been payable to the clerk of the Court of said district, to be used for the purposes of the said corporations, respectively. 6th S. L., 532, sec. 9.

All incorpo-
rated towns,
etc., may
collect taxes
on shows,
etc.

If any person shall represent, publicly, for gain and reward, any play, comedy, tragedy, interlude or farce, or other employment of the stage, or any part therein, or shall exhibit wax figures, or shows of any kind whatsoever, without having paid the tax required by law, to be paid to the clerks of the Courts respectively, before such representation or exhibition, it shall be the duty of the clerk of the Court, or of any magistrate for the district where the same may be done, to issue an execution for double the amount of tax so imposed, which execution may be directed to any sheriff or constable of this State, and against the body or goods of the person so being liable, and which may be levied in any district in the State; and every magistrate who shall so issue execution, shall cause the amount of the same to be paid to the clerk of the Court for his district; and the clerks of Courts shall pay annually, into the public treasury, all such taxes as may come into their hands respectively; *provided*, that nothing herein contained shall be construed to extend to any incorporated town, village or city. Act 1843, 246, sec. 3.

TICKETS; GIVING ONE TO A SLAVE.

Penalty for. If any person shall give a ticket or written permit to any slave, the property, or being under the charge of another, without the consent, or against the will of the owner, or other person having the charge of such slave, authorizing such slave either to be absent, or to deal, trade or traffic, such person shall be liable to be indicted, and on conviction, be punished by fine, not exceeding one thousand dollars, and be imprisoned, not exceeding twelve months; the entire fine thus imposed, to be given to the informer. 6th S. L., 552.

TRADING, OR GAMING WITH A SLAVE.

[See CORN.]

Buying corn, or other article. If any shop-keeper, trader, or other person, shall, by himself or any other person acting for him or her, as his or her clerk, or otherwise, directly or indirectly, buy or purchase from any slave, in any part of this State, any corn, rice, peas, or other grain, bacon, flour, tobacco, indigo, cotton, blades, hay, or any other article whatsoever, or shall otherwise deal, trade or traffic with any slave not having a permit so to deal, trade or traffic, or to sell any such article, from or under the hand of his master or owner, or such other person as may have the care and management of such slave, such shop-keeper, trader, or other person, shall, for every such offence, forfeit a sum not exceeding one thousand dollars, and imprisonment not exceeding a term of twelve months, nor less than one month. 7th S. L., 454, sec. 1.

Where any person shall purchase of any slave any article whatsoever, he shall retain in his possession the permit which such slave has produced; and whenever any person shall be charged with having trafficked with a slave contrary to law, it shall be the duty of such person to produce the permit and to prove its authenticity; and in default of producing the permit, and of proving its authenticity, such person shall be liable to the penalties imposed by law on the offence of trading and trafficking with slaves without permits. *Ibid*, sec. 2.

Under the Act against trading with a slave, *the selling goods to a*

lave for cash, was held indictable under the general words of the Act, "*or shall otherwise deal, trade or traffic.*" *State vs. Holman*; 1st M'C., 306.

Where I. sold a horse to a slave, belonging to the estate of H., without a written permit, but in the presence, and with the assent of an overseer of the estate, whose agency extended no farther than to see that the stock of the plantation were properly taken care of, and to give the negroes passes when necessary, it was held, that such presence and assent did not legalize the trading. It might be otherwise where the master, owner, or other person having the unqualified control of a slave, is present and assents to the sale. *State vs. Isaacs*, 1st Spear, 223.

If any white person shall game with any free negro or person of color, or slave, or shall bet upon any game played, wherein one of the parties is a free negro, person of color, or slave, or shall be willingly present, aiding and abetting, where any game of chance is played, as aforesaid, such person, upon conviction thereof, by indictment, shall be whipped, not exceeding thirty-nine lashes, and fined and imprisoned at the discretion of the Court trying such person. 7th S. L., 469, sec. 6th.

Gambling
with a
negro.

T R E A S O N .

[See INSURRECTION.]

Treason against the United States shall consist only in levying war ^{Definition.} against them, or in adhering to their enemies, giving them aid and comfort. Cons. U. S. Art. 3, sec. 3; 1 S. L., 178.

1st. WHAT AMOUNTS TO.

2d. EVIDENCE OF.

3d. PUNISHMENT.

1st. *What amounts to.*

To constitute treason, war must be actually levied against the United States. A mere conspiracy to subvert by force, the government of the country, is not treason. *Ex parte Bollman & Swartwout*, 4th Cranch's U. S. Rep., 126.

To constitute a levying of war, there must be an assemblage of persons, designed to affect by force a treasonable purpose. The mere enlistment of men for such a purpose is not sufficient.—*Ib.*

It is high treason to prevent the execution of an act of Congress, by force and intimidation. *U. S. vs. Mitchell*, 2d Dall. Penn. Rep. 355.

But a resistance of the execution of a law of the United States, accompanied with any degree of force, if for a private purpose, is not treason. To constitute that offence, the object of the resistance must be of a public and general character. *U. S. vs. Hoxie*, 1 Paine's U. S. C. C. Rep., 265.

Enlisting, or procuring any person to be enlisted, in the service of the enemy, is treason. Nothing will excuse the act of joining an enemy but the fear of immediate death; not the fear of any inferior personal injury, nor the apprehension of any outrage upon property. *Respublica vs. M'Carty*, 2d Dall. Penn. Rep., 87.

2d. Of the Evidence.

No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open Court. Cons. U. S., Art. 3, sec. 3; 1st S. L., 178.

Overt acts of treason must be proved by two witnesses, or by the confession of the party in open Court. *1 Burr's Trial*, 13, 14; 8th Am. Com. L., 173.

And if the overt act laid in the indictment is not proved by two witnesses, no testimony, in its nature corroborative or confirmatory, is admissible.—*Ib.*

After an overt act is proved to have been committed in the county where the indictment is laid, evidence may be given of an overt act committed in another county. *Respublica vs. Malin*, 1 Dall. Penn. Rep., 35.

Where the prisoner, in an indictment for high treason, had joined a party of American troops, supposing them to be British, it was held, that no evidence of words showing his mistake, and that it was his real intention to join the enemy, could be admitted.—*Ib.*

3d. Its Punishment.

The punishment of high treason by the common law, as stated by Mr. Justice Blackstone, is as follows: 1st, that the offender be drawn to the gallows, and not be carried or walk, though usually (by connivance, at length ripened by humanity into law) a sledge or

hurdle is allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement. 2d, that he be hanged by the neck, and then cut down alive. 3d, that his entrails be taken out, and burned, whilst he is yet alive. 4th, that his head be cut off. 5th, that his body be divided into four parts. 6th, that his head and quarters be at the king's disposal. 4th B. C., 92.

But by Cons. U. S., Art. 3, sec. 3; 1st S. L., 178; the Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted. Under which power it was enacted, 1st S. L. U. S., 83, sec. 1st, that if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States, or elsewhere, and shall be thereof convicted, on confession in open Court, or on the testimony of two witnesses to the same overt act of the treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death.

TURNPIKES.

Whereas it is necessary that the several roads which have been, or which hereafter may be constructed in this State, under the authority and at the expense thereof, should be protected by law from injury and dilapidation, and that provision should be made for keeping the same in good and constant repair.

Be it therefore enacted, that if any person shall wilfully and maliciously destroy, injure, or in any manner hurt, damage, impair, or obstruct any of the said roads, or any part thereof, or any bridge, culvert, drain, ditch, causey, embankment, wall, toll gate, toll house, or other erection belonging to the said roads, or any part thereof, the person so offending shall, on conviction thereof, be imprisoned not more than three months nor less than one month, and pay a fine not exceeding five hundred dollars, nor less than twenty dollars, at the discretion of the Court before which the conviction shall take place, and shall be further liable to pay all the expense of repairing the same. 9th S. L. 545.

Penalty for
injuring public
works.

Penalty for obstructing roads, etc.

If any person shall cause any obstruction to be placed in any part of the said roads, or on any bridge or causeway thereof, so as to obstruct or render dangerous or difficult the passage of carriages or other travelling thereon, and shall not immediately remove the same when required, he shall be deemed guilty of a nuisance, and, on conviction thereof, shall be fined in a sum not exceeding ten dollars, nor less than two dollars, and shall be further liable for the expenses of removing the said nuisance.—Ib.

Order of travelling regulated.

In travelling on every part of the State roads, the following order shall be preserved, to wit: all carriages of burthen, or for any other use, shall keep on the right side of the centre of the road, so as not to interfere with carriages travelling on the other side, except in the following cases, to wit: where the centre of the road is timbered less than fourteen feet wide, the following order shall be observed, to wit: the centre or timbered part of the road may be kept—

1st. By loaded wagons, drawn by more than three horses, travelling towards Charleston, and excluding all others therefrom.

2d. By loaded wagons, drawn by more than three horses, travelling towards the mountains, and excluding all others therefrom but the last.

3d. By other loaded wagons travelling towards Charleston, excluding therefrom all others but the two last.

4th. By other loaded wagons travelling towards the mountains, excluding all others therefrom but the three last.

And on the Saluda mountain road, all descending loaded wagons and carriages may keep the side of the road next to the mountain and furthest from the valley.

Slaves or persons of color offending, how to be proceeded against.

If any slave or free person of color shall commit any offence prohibited by this Act, he or she shall be proceeded against, charged with the said offence, and tried therefor, before a justice of the peace and freeholders, in such manner as is prescribed for the trial of slaves in cases less than capital, by the existing laws of this State. And the justice and freeholders are hereby authorized, on conviction by them, of any slave or free person of color for such offence, to cause the said slave or free person of color to be whipped, not exceeding thirty-nine, nor less than ten lashes.—Ib.

Width of roads.

On the Camden road, and on the State road above Goose Creek Bridge, up to the Columbia Bridge, the width of land taken for said roads is hereby declared to be fifty feet, that is to say:—extending twenty-five feet on each side from the centre of the road as constructed; and below Goose Creek, the width shall be sixty feet; and

all the land so declared to be taken is hereby vested in the State for the purposes of such roads; *provided*, that no land is hereby intended to be vested in the State which is now occupied by the dwelling or out houses of any citizen residing thereon. 6 S. L., 369.

If any person shall cut down or otherwise destroy any trees growing, or hereafter to be planted by the superintendant, or by his direction or permission, within the limits thus vested in the State for the roads aforesaid, such person, for every tree so cut down or destroyed, shall pay a fine not exceeding twelve dollars, nor less than five dollars, to be recovered before any justice of the peace of the district where such offence may be committed.—*Ibid*.

If any person shall break down, deface or otherwise injure any mile stone or other fixture to mark the distance on any of the roads constructed at the expense of the State, for every mile stone or fixture so broken down, defaced or injured, he or she shall pay a fine not exceeding twelve dollars, nor less than five dollars, to be recovered before any justice of the peace of the district where such offence may be committed. The fines collected under this and the preceding clause shall be paid, one half to the informer, and such informer shall be a competent witness to prove such offence; and the other half to the funds of the road whereon such offence shall be committed.—*Ibid*.

If any person, after travelling on any turnpike road of this State, by himself or servants, on horseback or with carriage of any description, horses, mules, cattle, hogs, or any other thing chargeable with toll, shall go or send the same, or any part thereof, around any toll gate, to avoid paying toll, or having passed the same through any toll gate, refuse to pay therefor, such person shall forfeit ten times the toll chargeable therefor; and the person entitled to receive said toll shall immediately issue his distress warrant therefor, and levy, or cause the same to be levied on any of said horses, mules, hogs, cattle, carriages, or any article loaded thereon, sufficient to pay said penalty; and the articles so distrained shall be disposed of in the same manner that goods distrained for rent arrear are or may be disposed of. 6th S. L., 381, sec. 9.

On the State road, road wagons drawn by four or more horses, mules or oxen, shall be required to keep on the timbered ways, where the road is timbered, unless it shall be necessary for them to leave these ways for the purpose of passing other vehicles, or avoiding broken places; and this regulation shall be posted up at every toll gate, and communicated to the driver of every such wagon, by every toll collector who shall receive toll from such driver; and in every

case of the violation of this regulation, the toll collector at either of the gates between which the violation took place, may proceed to collect ten times the toll which the said wagon may be liable to pay for passing at his gate, by distress warrant, as in case of an attempt to avoid paying toll, provided for in the ninth section of "An Act concerning the public works," passed the eighteenth day of December, in the year of our Lord one thousand eight hundred and twenty-nine. 6th S. L., 493, sec. 3.

VAGRANTS.

1st. WHO SHALL BE DEEMED VAGRANTS.

2d. FORM OF TRIAL AND PROCEEDINGS.

3d. PENALTIES.

1st. *Who shall be Deemed.*

Description
of persons
deemed
vagrants,
and liable to
the penalties
of this Act

All persons wandering from place to place without any known residence, or residing in any city, county or parish, who have no visible or known means of gaining a fair, honest, and reputable livelihood; all suspicious persons going about the country swapping and bartering horses or negroes, (without producing a certificate of his or their good character, signed by a quorum of the justices of the county, or by three justices of the peace of the parish from which such person is last come;) likewise all persons who acquire a livelihood by gambling or horse racing, without any other visible means of gaining a livelihood; also, all persons who lead idle and disorderly lives; all who knowingly harbor horse thieves and felons, and those who are known to be of that character and description; likewise all persons (not following some handicraft trade or profession, or not having some known or visible means of livelihood,) who shall be able to work, and occupying or being in possession of some piece of land, shall not cultivate such a quantity thereof as shall be deemed by one magistrate and four freeholders, or a majority of them, on oath, to be necessary for the maintenance of himself and his family; also, all persons representing publicly for gain or reward, any play, comedy, tragedy, interlude or farce, or other entertainment of the stage, or any part thereof; all fortune tellers for fee or reward; all sturdy beggars; and all unlicensed pedlars—are, and shall be, deemed vagrants, and liable to the penalties of this Act. 5th S. L., 41.

Every person of suspicious character coming to settle in any county or parish within this State, shall be deemed a vagrant, unless he produce a certificate from the justices of the county court of the county, or three justices of the peace of the parish, in which he last resided, setting forth that he is a person of a fair character, and not an idle or disorderly person; or unless he obtain, within the space of five days, sufficient security for his good behavior, for twelve months ensuing.

Persons of suspicious character deemed vagrants, unless proving to the contrary.

The keeper of any gaming table, faro bank, or other bank whatsoever used for gaming, known under any other denomination, is liable to be tried as a vagrant, and on conviction, to be punished in like manner. Act 1839, p. 17, sec. 13.

Keepers of gaming tables.

2d. Form of Trial and Proceedings.

Upon the oath of any creditable person, that another is to the best of his or her knowledge or belief, a vagrant, and liable to the penalties prescribed by law, any magistrate shall issue his warrant forthwith to any constable, requiring the accused to be brought before him, and shall summon five disinterested freeholders to join him in inquiring into the truth of the information, and the concurrence of any three of the five, with the magistrate, shall be conclusive. The freeholders, summoned as above, shall be chosen by placing the names of twelve disinterested freeholders of the neighborhood into a box or hat, out of which five shall be drawn by the accused, or by the magistrate, on refusal, who shall be summoned forthwith; and if any of the said freeholders shall fail to attend, the magistrate shall cause other names to be drawn in like manner from the remaining number, until the deficiency be supplied; and as soon as such magistrate and freeholders shall be convened, they shall proceed to examine how the accused maintains a livelihood, and maintains his or her family, (if he or she has any,) and if the quorum, above required, shall adjudge such person liable to the penalties prescribed by law, against such as are deemed vagrants, then, if the accused shall pay all lawful costs and charges of such proceeding, and give bond, with sufficient security, to be approved by the magistrate, for his or her good behavior, for twelve months ensuing, such person shall be discharged; but on refusal or inability to comply therewith, the magistrate may commit such person to jail, and shall transmit a copy of the proceedings, as soon as may be, to the clerk of the Court of Common Pleas and general sessions for the district, containing the names of the informer and accused, the magistrate and freeholders, together with those of the witnesses, and the

evidence they gave, which copy shall be filed in the office of the clerk, for the use of the Court of general sessions. Act 1839, p. 16, sec. 13.

3d. Penalties.

Services of the offender to be sold at auction.

If the Court shall not think fit to discharge the offender, then the clerk of the Court shall, before the last day of Court, make known to the inhabitants by an advertisement stuck up at the door of the court-house or jail of the district or county where he or she was apprehended, that the services of the offender will be sold at public sale on the last day of the Court, for a space of time not exceeding one year; and the person so purchasing the services of the said offender, shall receive from the clerk of the Court a certificate of such purchase, and thereupon the offender shall, during the term aforesaid, be subject to the penalties set forth and contained in the Act of Assembly entitled, "An Act concerning servants, and masters, and apprentices;" and the person who purchased his or her services, shall be entitled to all the benefits accruing to masters by the aforesaid Act. 5th S. L., 42, § 5.

Offender to be whipped, and to leave the district, if his services be not purchased.

In case no person shall purchase the services of the said offender, then the said offender is hereby declared liable to receive not more than thirty-nine, nor less than ten lashes, on the bare back, at the discretion of the judges of the county or circuit court, or court of sessions in Charleston, as the case may be, and adjudged to quit the county within twenty-four hours, or the district within three days. And if the said offender shall, after the time above prescribed, be found within the county or district from which he has been banished, and shall not be provided with a certificate of his good behavior from some one of the county Courts, or a judge of the Court of sessions, or cannot procure good security for his future good behavior, then he is hereby declared liable to the same penalties and punishments as above set forth: *Provided*, That in all cases where it shall be deemed practicable and expedient by the county Court, or judge of the Court of sessions, or circuit Court, to condemn the offender to hard labor, then such offender shall be sentenced to hard labor for a term not exceeding one year, and shall not receive the punishment by whipping, as aforesaid.—Ibid, p. 43, sec. 6.

Penalty on magistrates failing to do their duty.

If any magistrate shall fail or neglect to execute any of the duties herein set forth and prescribed, he shall be liable to pay a penalty of ten pounds; and any constable neglecting or failing in his duty aforesaid, shall be liable to pay five pounds; to be recovered by information before the justices of the county or circuit Court, or Court of

sions, as the case may require ; one moiety to go to the informer, and the other to the use of the county, if recovered in a county Court, and to the use of the State if recovered in any other Court, and to the use of the city if recovered in the Court of wardens.—Ib.

If any informer shall be convicted before the judges of the county circuit Court, or Court of sessions, of having preferred his complaint through malevolence or spite, without any just grounds of accusation, he shall be adjudged to pay a fine of five pounds to the party injured, besides being liable to an action for damages. And if any person shall wantonly prosecute any magistrate or constable for a neglect of duty, and shall fail in his proof of such neglect, he shall pay a fine of five pounds, to be recovered as aforesaid.—Ib.

Penalty on persons preferring charges without good reason.

WARRANT.

A precept under hand and seal, to a person authorized to take up any offender, to be dealt with according to due course of law.

1st. FOR WHAT CAUSE IT MAY BE GRANTED.

2d. ITS EXTENT AND AUTHORITY.

3d. ITS FORM, AND REQUISITES.

1st. *For what Cause it may be Granted.*

A warrant may be lawfully granted by any justice, for treason, felony, or *præmunire*, or any other offence against the peace; and it seems clear, that where a statute gives any one justice a jurisdiction over any offence, or a power to require any person to do a certain thing ordained by such statute, it impliedly gives a power to every such justice to make out a warrant to bring before him any one accused of such offence, or compellable to do any thing ordained by such statute; for it cannot but be intended, that a statute which gives a person jurisdiction over an offence, means also to give him the power incident to all Courts, of compelling the party to come before him. 4th Burns, 279.

It seems to have been doubted by some ancient authorities, whether justice might grant a warrant on suspicion. Hawkins, vol. 2, p.

On suspicion.

132, holds, that such doubts are contrary to constant practice and the statute 1 and 2 P. & M., c. 10. It is, however, now settled by Act of 1839, p. 23, sec. 4, that when complaint or oath shall be made before any magistrate, that a felony or misdemeanor has been committed, or *that the informant has good reason to believe, and does verily believe the same*, or when such magistrate is *otherwise reasonably satisfied* thereof, he is empowered and required to issue his warrant, under his hand and seal, against the *party charged*.

2d. Its Extent and Authority.

Throughout
the State.

By Act of 1839, p. 23, sec. 4; the warrant of a magistrate shall authorize the arrest and detention of any person charged therein, within any district in the State.

Must not be
general.

A general warrant, on a complaint of a robbery, to apprehend *all persons suspected*, has been ruled void. 4th Burns, 280.

3d. Its Form, and Requisites.

1st. It ought to be under the hand and seal of the justice who makes it out. 2d. It ought to set forth the year and day wherein it is made, that in an action brought upon an arrest made by virtue of it, it may appear to have been prior to such arrest. 3d. It is safe, but perhaps not necessary, in the body of the warrant, to shew the place where it was made; yet it seems necessary to set forth the county in the margin at least, if it be not set forth in the body. 4th. It may be made either in the name of the king, or of the justice himself; 2d Hawkins, p. 136. 5th. It must plainly express the offence charged, and supposed time of its commission; Act 1839, p. 23. 6th. It must regularly mention the name of the party to be attached, and must not be left in general, or in blank, to be filled up by the party afterwards; 4th Burns, 282. 7th. A warrant may be either general, to bring the party before any justice of peace of the county, or special, to bring him before the justice only who granted it. 8th. It may be directed to the sheriff, bailiff, constable, or to any indifferent person by name, who is no officer; for that the justice may authorize any one to be his officer, whom he pleases to make such, yet it is most advisable to direct it to the constable of the precinct wherein it is to be executed; for that no other constable, and *a fortiori* no private person, is compellable to serve it; 2 Hawkins, 137. Lastly, the affidavit upon which the warrant is issued, must accompany the same. Act 1839, p. 23.

General form of Warrant.

STATE OF SOUTH-CAROLINA, }
 District. }

By A. B., Magistrate in and for the said State.

To any lawful Constable.

Whereas, complaint upon oath has been made unto me by

These are, therefore, to command you to apprehend the said
 and to bring before me, to be dealt with according
 to law.

Given under my hand and seal, at this day of one
 thousand eight hundred and

A. B. [L. s.]

WHIPPING A SLAVE.

If any person shall unlawfully whip or beat any slave, not under Penalty.
 his or her charge, without sufficient provocation, by word or act,
 such person, on being indicted and convicted thereof, shall be punished
 by fine or imprisonment, at the discretion of the Court; the impris-
 onment not to exceed six months, and the fine not to exceed five
 hundred dollars. Act 1841, p. 155.

W O M E N .

[See BIGAMY, RAPE, SOLE TRADER, &c.]

1st. OFFENCES AGAINST.

2d. FOR WHAT CRIMES A MARRIED WOMAN MAY BE PUNISHED.

3d. HOW SHE MAY RENOUNCE HER DOWER AND INHERITANCE.

1st. Offences against.

If any person shall unlawfully and carnally know and abuse any
 woman child under the age of ten years, he shall be guilty of felony ^{Abusing a}
 without benefit of clergy. 18 El., c. 7. ^{child.}

If any person take by force, or otherwise, any woman *sole*, having

Binding by force. any substance of lands, tenements, or moveable goods, and enforce her before she be set at liberty, to bind herself to him by statute of obligation, such bond shall be void. 31 H. 6, c. 9.

Marrying an heiress by force. Whereas women, as well maidens as widows and wives, having substances, some in goods moveable, and some in lands and tenements, and some being heirs apparent unto their ancestors, for the lucre of such substances are sometimes taken by misdoers contrary to their will, and after married to such misdoers, or to other by their assent, or defiled; it is enacted, that what person that taketh any woman so against her will unlawfully, that is to say, maid, widow, or wife, that such taking, procuring, and abetting the same, and also receiving wittingly the same woman, so taken against her will, and knowing the same, be felony: and that such misdoers, takers, and procurators to the same, and recitors knowing the said offence, shall be adjudged as principal felons. 3 H. 7, c. 2.

Requisites to complete offence. Upon the face of which said statute of the 3 H. 7, these things are required to make the offence felony: 1st, that the maid, wife, or widow, have lands or tenements, or moveable goods, or be an heir apparent. 2d. that she be taken away against her will. 3d. that the taking was for lucre. And, 4th, that she be married to the misdoer, or to some other by his consent, or be defiled, (that is carnally known;) for if these concur not, and be so laid in the indictment, the misdoer is not a felon within the statute, but otherwise to be punished. 3 Inst., 61. 1 Haw., 110.

Aiders and abettors. The said act makes not only the takers, but the procurers and abettors of the felony, and receivers of the woman wittingly, knowing the same, to be all principal felons; the like whereof lord Coke says, he hath not found in any other statute that he remembers: but by the construction of the common law, they that receive the misdoers, and not the woman, are accessaries only. 3 Inst., 61, 62.

But those who are only privy to the marriage, but no way parties to the forcibly taking away, or consenting thereto, are not within the statute. 1 Haw., 110.

Effect of consent. It is no manner of excuse, that the woman at first was taken away with her own consent; because if she afterwards refuse to continue with the offender, and be forced against her will, she may from that time as properly be said to be taken against her will as if she had never given any consent at all; for until the force was put upon her, she was in her own power. 1 Haw., 110.

Also, it is not material whether a woman so taken contrary to her

will, be at last married or defiled with her own consent, or not, if she were under the force at the time. 1 Haw., 110.

2d. For what Crimes a Married Woman may be Punished.

But a *feme covert* is so much favored in respect of that power and authority which her husband has over her, that she shall not suffer any punishment for committing a bare theft, or even a burglary, by the coercion of her husband, or in his company, which the law construes a coercion. But this is only the presumption of law; so that if upon the evidence it can clearly appear that the wife was not drawn to the offence by her husband, but that she was the principal inciter of it, she is guilty as well as the husband. And if she be any way guilty of procuring her husband to commit the offence, it seems to make her an accessary before the fact in the same manner as if she had been *sole*. And if she commit a theft of her own voluntary act, or by the bare command of her husband, or be guilty of treason, murder or robbery, in company with or by coercion of her husband, she is punishable as much as if she were *sole*. And she will be guilty in the same manner of all those crimes which, like murder, are *mala in se*, and prohibited by the law of nature. And in one case it appears to have been held by all the judges, upon an indictment against a married woman, for falsely swearing herself to be next of kin and procuring administration, that she was guilty of the offence, though her husband was with her when she took the oath. But upon an indictment for disposing of forged notes, it was ruled that a woman was protected by being the wife of a man indicted, who disposed of them in her presence, and with whom she was indicted. 1st Russ., page 15.

But where the wife is to be considered merely as the servant of the husband, she will not be answerable for the consequences of his breach of duty, however fatal, though she may be privy to his conduct. Charles Squire and his wife were indicted for the murder of a boy, who was bound as a parish apprentice to the prisoner Charles; and it appeared in evidence that both the prisoners had used the apprentice in a most cruel and barbarous manner, and that the wife had occasionally committed the cruelties in the absence of her husband. But the surgeon who opened the body, deposed that in his judgement the boy died from debility and want of proper food and nourishment, and not from the wounds, &c., which he had received. Upon which, Lawrence, J., directed the jury, that, as the wife was the servant of the husband, it was not her duty to provide the apprentice with suffi-

Feme covert
under the
coercion of
her husband.

Not answer-
able for her
husband's
breach of
duty.

cient food and nourishment, and that she was not guilty of any breach of duty in neglecting to do so, though, if the husband had allowed her sufficient food for the apprentice, and she had wilfully witholden it from him, then she would have been guilty. But that here the fact was otherwise; and therefore, though in *foro conscientiae* the wife was equally guilty with her husband, yet, in point of law, she could not be said to be guilty of not providing the apprentice with sufficient food and nourishment.—Ibid, p. 16.

In inferior misdemeanors a wife may be indicted, together with her husband; and she may be punished with him for keeping a bawdy house, for this is an offence as to the government of the house in which the wife has a principal share; and also such an offence as may generally be presumed to be managed by the intrigues of the sex. But a prosecution for a conspiracy is not maintainable against a husband and wife only; because they are esteemed but as one person in law, and are presumed to have but one will.—Ibid.

But in some cases a *feme covert* is responsible for her offence.

In all cases where the wife offends alone without the company or coercion of her husband, she is responsible for her offence as much as any *feme sole*. Thus she may be indicted alone for a riot; may be convicted of selling gin against the injunctions of the 9 Geo. 2, c. 23, or for recusancy. And she may be indicted for being a common scold; for assault and battery; for forestalling; for a forcible entry; or for keeping a bawdy house, if her husband do not live with her; and for trespass or slander. And she may also be indicted for receiving stolen goods of her own separate act without the privity of her husband; or if he, knowing thereof, leave the house and forsake her company, she alone shall be guilty as accessary; and though in a serious offence, such as that of sending threatening letters, the husband be an agent in the transaction, yet if he be so ignorantly by the artifice of the wife, she alone is punishable. And, generally, a *feme covert* shall answer as much as if she were *sole*, for any offence not capital against the common law or statute; and if it be of such a nature that it may be committed by her alone, without the concurrence of the husband, she may be punished for it without the husband, by way of indictment; which being a proceeding grounded merely on the breach of the law, the husband shall not be included in it for any offence to which he is in no way privy.—Ibid, p. 17.

Coercion of the husband not to be presumed when he is not present at the com-

It is no excuse for the wife that she committed the offence by her husband's order and procurement, if she committed it in his absence; at least it is not to be presumed in such case, that she acted by coercion. Sarah Morris was tried for uttering a forged order, knowing it

to be forged, and her husband for procuring her to commit the offence; and it appeared that her husband ordered her to do it, but that she uttered the instrument in his absence. Upon a case reserved, the judges held that the presumption of coercion at the time of the uttering, did not arise, as the husband was absent at that time; and that the wife was properly convicted of the uttering, and the husband of the procuring.—Ibid.

A *feme covert* is not guilty of felony in stealing her husband's goods, because a husband and wife are considered but as one person in law, and the husband, by endowing his wife at the marriage with all his worldly goods, gives her a kind of interest in them; for which cause, even a stranger cannot commit larceny in taking the goods of the husband by the delivery of the wife, as he may by taking away the wife by force and against her will, together with the goods of the husband.—Ibid, p. 19.

mission of the crime, though it were committed by his procurement.

The wife is not guilty of felony in stealing her husband's goods.

A *feme covert* shall not be deemed accessory to a felony for receiving her husband who has been guilty of it, as her husband shall be for receiving her, nor shall be a principal in receiving her husband when his offence is treason; for she is *sub potestate viri*, and bound to receive him. Neither is she affected by receiving, jointly with her husband, any other offender.—Ibid.

Feme covert not accessory for receiving her husband.

3d. *How she may Renounce her Dower, &c.*

The wife of any grantor conveying real estate, may, if she be of lawful age, release, renounce, and bar herself of, her dower, in all the premises so conveyed, by going before any judge of the Court of Common Pleas, or justice of the quorum, or any judge of the Court of the county wherein she may reside, or the land may be, and acknowledge before him, upon a private and separate examination, that she did freely and voluntarily, without any compulsion, dread or fear, of any person whomsoever, renounce and release her dower to the grantee, and his heirs and assigns, in the premises mentioned in such deed. *Provided*, that a certificate, under the hand of the woman, and the hand and seal of the judge or justice, as aforesaid, shall be endorsed upon such release, or a separate instrument of writing to the same effect, in the form or to the purport hereafter following, and be recorded in the office of mesne conveyances, or office of the clerk of the county Courts, in the districts or county where the land lies. 5 S. L., 256, sec. 2.

Wife may renounce her dower.

THE STATE OF SOUTH CAROLINA,
 ——— DISTRICT.

Form of
 certificate for
 renunciation
 of dower.

I, F. G. one of the Judges of ——— (or justice of the quorum, as the case may be,) do hereby certify unto all whom it may concern, that E. B. the wife of the within named A. B. did, this day, appear before me, and upon being privately and separately examined by me, did declare that she does freely, voluntarily, and without any compulsion, dread or fear, of any person or persons whomsoever, renounce, release, and for ever relinquish unto the within named C. D., his heirs and assigns, all her interest and estate, and also all her right and claim of dower, of, in or to all and singular the premises within mentioned and released.

Given under my hand and seal, this ——— day of ——— Anno
 Domini ———

Signed

E. B.

[L. s.] F. G. Judge of

Wife may
 release her
 inheritance.

Every married woman, of the age of twenty-one years, who may be entitled to any real estate as her inheritance, and may be desirous of joining her husband in conveying away the fee simple of the same to any other person, may bar herself of her inheritance in such real estate, by joining with her husband in a release to the purport of the one herein before prescribed: Provided she will go before some one of the judges or justices, in the preceding clause of this Act mentioned, at any time after the expiration of seven days after such release has been duly executed as aforesaid, and will then, upon a private and separate examination by him, declare to him that she did, at least seven days before such examination, actually join her husband in executing such release, and did then, and at the time of her examination still does, freely, voluntarily, and without any manner of compulsion, dread or fear, of any person or persons whomsoever, renounce, release, and for ever relinquish, all her estate, interest and inheritance in the premises mentioned in the release, unto the grantee, and his heirs and assigns: And also provided, that a certificate, signed by the woman, and under the hand and seal of the judge or justice, as aforesaid, shall then be immediately indorsed upon the said release, or a separate instrument of writing to the same effect, in the form or to the purport of the certificate prescribed in the preceding clause of this Act; to which certificate an addition to the following effect shall invariably be made, to wit: that the woman did declare that the release was positively and *bona fide* executed at least seven days before such her examination; and such renunciation shall not be

considered as being complete or legal, until the same shall be recorded in the office of mesne conveyances, or office of the clerk of the county Courts, in the districts or county where the land lies. Ibid.

WITNESS.

Upon information made of the materiality of any witness within the State, to support any accusation made, or where the materiality of such witness shall be within the knowledge of any magistrate, he shall issue his warrant, requiring such witness to appear before him or the next magistrate, to enter into recognizance, with good security, if deemed proper, which warrant shall authorize the arrest and detention of any such witness, in any district in the State; and on being brought before such magistrate, and refusing to enter into recognizance, such witness may be committed by the said magistrate; and the accused shall, in felonies, and no other case, have the like process to compel the attendance of any witness in their behalf, as is granted or permitted on the part of the State; *provided*, that no magistrate shall receive any fees for issuing more than one warrant for witnesses on the part of the State, or upon the part of the accused in the same case, unless on the second or other application, oath shall be made, that the prosecutor or accused was not aware, at the issuing of the previous warrant, of the materiality of such witness. Act 1839, p. 15, sec. 8.

The recognizance of any prosecutor, or witness, in case of misdemeanor, shall not be for less than one hundred dollars; and in case of capital felony, for not less than five hundred dollars: though in all cases, the magistrate shall cause the same to be in such larger amount as the circumstances may seem to require.—Ibid, sec. 7.

WRECK S.

If any person or persons shall plunder, steal, take away or destroy, any goods or merchandize, or other effects, from any ship or vessel belonging to the Prince, or public, or to any private subject, of any foreign nation in alliance or neutrality with the United States, or belong-

Penalty of death to rob foreign vessels that are in distress or wrecked.

ing to any citizen of this or any other of the United States, which shall be in distress, or which shall be wrecked, lost, stranded, or cast on shore in any part of this State, (whether any living creature be on board such vessel or not,) or shall make a hole or holes in the bottom of any ship or vessel in distress, or shall take away a pump, or wilfully and unlawfully do any mischief tending to the loss of such ship or vessel, or shall take away any of the furniture, tackle, apparel, provision, or part of such ship or vessel, such person or persons, so offending, shall be deemed guilty of felony, and being lawfully convicted thereof, shall suffer death as in cases of felony, without benefit of clergy. 4th S. L., 550, sec. 1.

Provido.

Provided always, When goods or effects, of small value, that may be stranded, shall be stolen without circumstances of outrage or violence, the offender being convicted thereof, shall forfeit and pay treble the value, to be ascertained by two justices of the peace.—Ib., sec. 2.

Justices of the peace to issue search warrants for stolen goods.

It shall and may be lawful for any justice of the peace, on information upon oath, of any part of a cargo or effects of any vessel lost or stranded on or near the seacoasts, being unlawfully conveyed or concealed, or of some cause or reasonable suspicion thereof, to issue his warrant for searching for such goods or effects, as in cases of stolen goods; and if the same be found in any house or other place, or in the possession of any person not legally authorized to have the same, and the person in whose possession the same shall be found, shall not immediately upon demand, deliver the same to the owner or person lawfully authorized to receive them, he or she shall forfeit and pay to the owner or owners of such goods, his or their agent or attorney, treble the value, for such refusal. And any person discovering where any such goods are wrongfully bought, sold, or concealed, so that the owner, his agent or attorney, shall regain them, he or she shall be entitled to a reasonable salvage, not exceeding twenty-five per cent. on the value, to be adjusted by the next neighboring justice of the peace, who is hereby required to adjust the same.—Ibid, sec. 3.

Goods unlawfully taken from vessels that are lost may be seized.

If any person or persons shall offer or expose to sale any goods or effects whatsoever, belonging to any ship or vessel lost, stranded, or cast on shore as aforesaid, and unlawfully taken away, or reasonably suspected to have been, then, and in every such case, it shall be lawful for the person or persons to whom the same shall be so offered for sale, or any justice of the peace, or officer of militia, to stop and seize the said goods and effects; and if the person or persons who shall have offered the said goods and effects to sale, or some other person in his

or her behalf, shall not within ten days next after such seizure, make out to the satisfaction of such justice of the peace, that they became honestly possessed of them, then the said goods and effects shall, by order of the said justice, be forthwith delivered over to and for the use of the owner thereof, on proof of his claim, and the payment of a reasonable reward, not exceeding five per cent. on the value, for such seizure, (to be ascertained by the said justice,) to the person who shall seize the same. And he, she, or they, who offered such goods and effects for sale as aforesaid, shall forfeit and pay to the owner or owners twice the value of such goods, to be recovered according to law.—Ibid, sec. 4.

In case any person or persons, not employed by the master, mariners, or owners, or other persons lawfully authorized, in the salvage of any ship or vessel, or the cargo or provision thereof, shall, in the absence of the master, or mariners, or owners, save any such ship, vessel, goods, or effects, and cause the same to be carried for the benefit of the owners into any port, inlet or place of safety within this State, immediately giving notice thereof to a custom-house officer, justice of peace, or militia officer, such person or persons shall be entitled to a reasonable salvage for such services, to be paid by the masters or owners of such vessel or goods; and in case of disagreement about the quantum of such salvage, the same to be adjusted by one or more neighboring justices of the peace, not exceeding three.—Ibid, sec. 4.

When any ship or vessel, or effects, shall be stranded on any part of the coasts of this State, or upon any application of the commander of any ship or vessel stranded, to any justice of the peace or militia officer, such justice or militia officer, or the nearest justice or militia officer to the place where any vessel, goods or effects shall be stranded or cast away, shall forthwith give public notice for a meeting to be held as soon as possible, of any two justices of the peace, and militia officers, and such a party of the militia as may be necessary; and such justices of the peace, or militia officer or officers, are hereby required and empowered to give aid in the execution of this Act, and to employ proper persons for the saving such vessels in distress, or such vessels, goods, or effects, as shall be stranded or cast away, and also to examine persons upon oath, touching or concerning the same, or the salvage thereof, and to adjust the quantum of such salvage, and distribute the same among the persons concerned in the salvage, in case of disagreement among the parties, or the said persons; and every such justice of peace, or militia officer, attending and acting for the preservation

Persons saving a ship, though not employed, entitled to salvage.

The duty of justices of the peace and military officers when any vessel is stranded on the coast.

of any such vessel or goods, shall be paid three dollars per day for his trouble, out of the vessel, goods, or effects, saved by their care or discretion.—Ibid, sec. 6.

Persons
assaulting
another
when saving
a vessel, may
be punished
by the court.

If any justice of the peace, militia officer, or other person acting in the preservation or salvage of any vessel, goods or effects, shall be assaulted, beaten, or wounded, every person or persons so assaulting, beating, or interrupting, shall, upon conviction thereof, before the Court of sessions, receive such punishment, not extending to life or limb, as the said Court in their discretion shall award.—Ib., sec. 7.

Duty of
justices of
the peace,
etc., where
goods are
cast on shore
and saved,
and no person
appears to
claim them.

If any ship or vessel, goods or effects, shall be stranded, or cast on shore, and no person appears to claim the goods which shall be so saved, two or more neighboring justices of the peace, or militia officers, shall take the same into their custody or possession, and as soon as may be, give notice and a schedule in writing of the different articles, (such justice keeping a copy thereof,) to the collector of the customs, and deliver safely all such goods and effects to the said collector or his order, who shall be responsible for the same, and who shall give public notice thereof in the Gazettes of this State, for at least eight months, if no claim should be made; and if such goods be not claimed within twelve months after such delivery to the collector as aforesaid, they are to be publicly sold, (or if the goods be perishable, to be sold forthwith,) and after deducting reasonable charges, the residue shall be lodged in the public treasury, subject to the claim of the proprietor, his agent or attorney.—Ibid, sec. 8.

Persons
entering
forcibly any
ship stran-
ded.

If any person or persons not empowered, shall enter, or try to enter, forcibly on board any ship or vessel stranded or cast away, or in distress, or molesting the preservation thereof, he or they may be repelled by force. And if any person or persons shall carry away or secrete, any goods and effects saved as aforesaid, such person or persons shall forfeit and pay treble the value, to be recovered by the owner of such goods, or his agent, in any Court of record in this State.—Ib., sec. 9.

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